IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-641

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners
v.
DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

NO. 76-

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners
v.
WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

NO. 75-2289

Your Nos. BRB 74-191 & 74-191A

P. C. PFEIFFER COMPANY, and TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

DIVERSON FORD and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

Petition for Review of an Order of the Benefits Review Board, United States Department of Labor, (Texas Case)

Before TUTTLE, THORNBERRY and TJOFLAT, Circuit Judges.*

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* Judge Thornberry was a member of the panel that heard oral arguments but due to illness did not participate in this decision. 28 U.S.C. § 46(d) (1970).

JUDGMENT

This cause came on to be heard on the petition of P. C. Pfeiffer Company and Texas Employers' Insurance Association for review of an order of the Benefits Review Board, Department of Labor and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Benefits Review Board, Department of Labor in this cause be, and the same is hereby affirmed;

It is further ordered that petitioners pay to respondents, the costs on appeal to be taxed by the Clerk of this Court.

September 27, 1976

Issued as Mandate:

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1975

NO. 75-4112

Your Nos. BRB 75-137 & 75-137A

AYERS STEAMSHIP COMPANY and TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

WILL BRYANT & DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR,
Respondents.

Petition for Review of an Order of the Benefits Review Board, United States Department of Labor, (Texas Case)

Before TUTTLE, THORNBERRY and TJOFLAT, Circuit Judges.*

JUDGMENT

This cause came on to be heard on the petition of Ayers Steamship Company and Texas Employers' Insurance

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* Judge Thornberry was a member of the panel that heard oral arguments but due to illness did not participate in this decision. 28 U.S.C. § 46(d) (1970).

Association for review of an order of the Benefits Review Board, Department of Labor and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Benefits Review Board, Department of Labor in this cause be, and the same is hereby affirmed;

It is further ordered that Petitioners pay to respondents, the costs on appeal to be taxed by the Clerk of this Court.

September 27, 1976

Issued as Mandate:

JACKSONVILLE SHIPYARDS, INC.,
and Aetna Casualty & Surety Company, Petitioners,

v.

Herbert L. Perdue and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

JACKSONVILLE SHIPYARDS, INC.,
and Aetna Casualty & Surety Company, Petitioners,

v.

Charles W. SKIPPER and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

P. C. PFEIFFER COMPANY and
Texas Employers' Insurance Association, Petitioners,

v.

Diverson FORD and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

HALTER MARINE FABRICATORS, INC.,
and Fidelity & Casualty of New York, Petitioners,

v.

John L. NULTY and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

AYERS STEAMSHIP COMPANY and
Texas Employers' Insurance Association, Petitioners,

v.

Will BRYANT and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

Nos. 75-1659, 75-2833, 75-2289
75-2317 and 75-4112

United States Court of Appeals,

Fifth Circuit.

September 27, 1976.

Proceeding was brought to review awards to five shoreside workers, who were injured in course of their employment, under 1972 Amendments to Longshoremen's and Harbor Workers' Compensation Act by Benefits Review Board. The Court of Appeals, Tjoflat, Circuit Judge, held that Board properly awarded benefits to two workers who were handling maritime cargo on shore as well as to a carpenter who was fabricating parts for a new ship, but that Board misconstrued Act in extending coverage to shipboard worker who stumbled in front of his employer's office a mile from ship and to employee who was helping to tear down shed in disused marine repair facility; and that Congress, which could reasonably have felt that shipbuilding employees beside navigable waters were performing sufficiently maritime function to be covered by harbor workers' compensation statute, did not exceed its broad discretion by extending coverage to such work.

Affirmed in part and reversed in part.

* * *

Petitions for Review of Orders of the Benefits Review Board, United States Department of Labor.

Before TUTTLE, THORNBERRY and TJOFLAT, Circuit Judges.*

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* Judge Thornberry was a member of the panel that heard oral arguments but due to illness did not participate in this decision. 28 U.S.C. § 46(d) (1970).

TJOFLAT, Circuit Judge.

I

AN OVERVIEW OF THESE CASES

The Parties and Their Dispute. With these five vigorously contested appeals, petitioners and respondents join battle for the third time. Each individually named respondent is a shoreside worker who was injured in the course of his employment. These respondents claim that their injuries are covered by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act (the Act), 33 U.S.C. §§ 901 *et seq.* (1970). In their fight for coverage, the workers have a new and virtually untested weapon, *viz.*, those portions of the 1972 Amendments which expanded the scope of the Act.[1] They also have a powerful and articulate ally in the other respondent, the Director of the Officer of Workers' Compensation Programs of the United States Department of Labor (the Director).[2] The forces arrayed against respondents consist of the workers' employers and the employers' insurance carriers.

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1. Especially pertinent are new Sections 902(3) (definition of "employee"), 902(4) (definition of "employer"), and 903(a) (expanded situs provision in new Act). Despite the fact that more than three years have passed since the Amendment's effective date, litigation over the Act's new coverage is just now beginning to reach the courts. *See Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975. *See also I. T. O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080 (4th Cir. 1975), *rehearing en banc granted* (4th Cir. Mar. 12, 1976).

2. As shall appear *infra*, there is a dispute as to whether the Director is a proper party respondent in this Court, or whether his status is merely that of *amicus curiae*. In Part V of this opinion, we hold that the Director is a proper respondent.

Procedural History. In each of the cases, a preliminary skirmish was fought before an Administrative Law Judge.[3] Reports from these battlefields show mixed results; petitioners won three of the engagements, and respondents two. The theater of operations then shifted to the Washington, D.C., headquarters of the Benefits Review Board of the Department of Labor (the Board).[4] The Board adopted an extremely liberal view of the Act's coverage, and respondents swept to victory in all five cases. After losing the fight in Washington, D.C., petitioners chose to escalate the conflict by asking this Court to review the Board's decisions.[5]

The Issues on Appeal. Before this Court, the lines of battle have been drawn with admirable clarity and good sense. Both sides have declined to assume certain exposed legal positions where they would quickly fall prey to the enemy's fire. Thus, respondents concede that the five accidents would not have been covered by the pre-1972 Act. Similarly, petitioners concede that the 1972 Amendments have broadened the Act's scope to include *some* shoreside injuries. The issue which divides the two camps

3. New Section 919(d) provides that evidentiary hearings shall be held before hearing examiners. The administrative regulations relating to the Amendments make it clear that such hearing examiners are to be Administrative Law Judges. *See* 20 C.F.R. § 702.332 (1975).

4. Pursuant to Section 921(b)(3) of the new Act, the Benefits Review Board is authorized to hear appeals by any party in interest from the Administrative Law Judge's orders. The Board must base its decision upon the hearing record and is bound by a "substantial evidence" standard in its review of findings of fact. *Id.*

5. Jurisdiction over these appeals is conferred upon us by Section 921(c) of the new Act. Thereunder, a party aggrieved by a final order of the Board may obtain review of that order in the Court of Appeals for the federal judicial circuit in which the employee's injury occurred.

is, of course, whether the Act was expanded far enough to reach *these* five injuries. We hold that the Board properly awarded benefits to two workers who were handling maritime cargo on shore, as well as to a carpenter who was fabricating parts for a new ship. However, the Board misconstrued the Act in extending coverage to the other two respondents, a shipboard worker who stumbled in front of his employer's office a mile from the ship, and an employee who was helping to tear down a shed in a disused marine repair facility.

Not content with merely jousting over the scope of the revised Act, three of the petitioners have broken ranks to seek out other *casus belli.* The petitioners in the *Halter Marine* case argue that the Act is unconstitutional if it covers injuries to shipbuilders on shore. In *Pfeiffer*, we are told that the Board violated the petitioners' right to due process by the method in which it awarded a fee to the claimant's attorney. The *Ayers Steamship* petitioners enter the lists with a plan to split the enemy forces; they claim that the Director is not a proper respondent in these appeals. As will hereinafter appear, we reject all of these additional contentions.

II

SCOPE OF THE 1972 AMENDMENTS

Of the many changes which Congress made in the Act in 1972, we are here concerned with only one: the extension of the Act's coverage inland to reach certain maritime-related injuries. Under the prior Act, coverage was overwhelmingly situs-oriented. As a general rule, an employee's injury was compensable if it occurred "upon the navigable waters of the United States (including any dry

dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law . . ."[6] Interpretation of this provision was immensely complicated by a judicially created doctrine under which some "maritime but local" injuries could be covered by both state and federal compensation schemes. *See, e.g., Calbeck v. Travelers Ins. Co.,* 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962); *Davis v. Department of Labor,* 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942). However, the Supreme Court made it clear that, whatever the exact parameters of the "maritime but local" doctrine, the federal Act would generally be confined to injuries occurring over the waters. Thus, in *Nacirema Operating Co. v. Johnson,* 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed.2d 371 (1969), the Court held that the Act did not cover injuries to longshoremen who were working on a pier permanently affixed to the shore. Coverage was denied despite the fact that the workers had been injured while loading and unloading ships, an employment as maritime in nature as any land-based employment could be.[7] The inequities of this "water's edge" division between covered and noncovered work were a major factor behind the decision to expand the scope of the Act.[8]

6. See former 33 U.S.C. § 903(a). There were certain exemptions from coverage, all of which have been carried over into the new Act. See *id., as amended,* § 903(a)(1) (masters and crew members; persons engaged by masters to service vessels under eighteen tons net); *id.* § 903(a)(2) (government employees); *id.* § 903(b) (injuries caused solely by the employee's intoxication or willful conduct).

7. Further underscoring the maritime context of these injuries was the fact that the injuries were caused by ships' cranes which had swung out of control. 396 U.S. at 213-14, 90 S.Ct. 347.

8. *See* H.R. No. 92-1441, 1972 *U.S. Code Congressional & Administrative News* at 4707.

[1] Two of the Act's new sections are pertinent to the present appeals.[9] The first of these defines the status which the affected employee must occupy to bring his injury within the Act's coverage:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . 33 U.S.C. § 902(3).

The other provision describes the situs where a covered injury must occur:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading unloading, repairing, or building a vessel). *Id.* § 903(a).

From these statutes, the general thrust of the new Act's coverage is clear. Congress has replaced the old "water's

9. None of the employers denies that it is an "employer" within the meaning of new Section 902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

In any event, it is clear that this section requires merely that an employer have at least one employee engaged in "maritime employment" (the requirement of new Section 902(3)'s definition of an "employee") on the situs defined in new Section 903(a). Thus, if a claimant can satisfy Sections 902(3) and 903(a), his employer is automatically brought within Section 902(4).

edge" analysis with a two-part test which requires (1) that the claimant have been engaged in "maritime employment" and (2) that the injury have taken place upon the situs specified in the Act.

[2, 3] The Act's definition of "maritime employment" is the focus of most of the legal controversy which rages in the parties' voluminous briefs. Unfortunately, much of this learned debate is of little relevance, if any, to the cases now before this Court. Counsel have drawn our attention to a host of pre-1972 decisions which discussed the meaning of the term "maritime employment" as used in the former Act. *See, e.g., Pennsylvania R.R. v. O'Rourke,* 344 U.S. 334, 73 S.Ct. 302, 97 L.Ed 367 (1953); *Nalco Chemical Corp. v. Shea,* 419 F.2d 572 (5th Cir. 1969). Under the old Act, as under the present one, an employer was liable if he had one or more employees engaged in "maritime employment".[10] However, judicial constructions of the pre-1972 Act were necessarily limited by the "water's edge" approach of that statute.[11] For this reason, these older cases simply do not speak to the issue of what land-based employment is sufficiently "maritime" to be covered by the new Act.[12] Fortunately,

10. Compare old 33 U.S.C. § 902(4) with new 33 U.S.C. § 902(4). As we have indicated, *supra* note 9, the only way to read the new Act consistently is to give the words "maritime employment" in new Section 902(4) the same meaning as in new Section 902(3).

11. Not only, as noted was the "water's edge" doctrine applied to the situs of the claimant's injury, but the "maritime employment" of the employer's workers was required to take place "upon the navigable waters of the United States (including any dry dock)". See old 33 U.S.C. § 902(4).

12. The commendable diligence of counsel has uncovered some scattered dicta which might be read as suggesting the general nature of "maritime" work. *See, e. g., Pennsylvania R. R. v. O'Rourke, supra,*

Congress itself has answered that question. The terms of the statute allow coverage for an injured employee who was working as a longshoreman, a ship repairman, a shipbuilder, or a shipbreaker.[13] The legislative history tells us that an injured employee will be covered if he was "engaged in loading, unloading, repairing, or building a vessel,"[14] but will not be covered merely because he was injured in the area defined by new Section 903(a).[15] In light of these indicia of Congressional intent, we must agree with the Court of Appeals for the Ninth Circuit that the new Act requires such a claimant to have been engaged in the work of loading, etc. *at the time of the injury. Weyerhaeuser Co. v. Gilmore,* 528 F.2d 957, 960 (9th Cir. 1975). We therefore reject respondents' contention that an employee's general job classification (such as "longshoreman" or "ship repairman") will bring him within the Act's coverage regardless of the nature of the work which he was performing when he was injured.[16] In its

344 U.S. at 339-40, 73 S.Ct. 302. These occasional pronouncements by the courts have, at best, only the most tenuous connection with the 1972 Amendment's extension of coverage to shoreside injuries. In comparison with the statutory language itself and the legislative history, the timeworn dicta which are urged upon us are entitled to little weight. Also, we note that none of the instant appeals involves an injury which occurred over the waters. Therefore, we need not, and do not, decide if the new Act made any changes in the coverage of such injuries.

13. 33 U.S.C. § 902(3).

14. In light of the statutory language, we regard the omission of shipbreaking from this passage as inadvertent.

15. "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." H.R. No. 92-1441, 1972 *U.S. Code Congressional & Administrative News,* at 4708.

16. For the same reason we also cannot accept the notion that the official name of an employee's union or the language of a union's

reports, Congress has also indicated the extent to which coverage should be granted to persons who are not themselves loading, unloading, repairing, building, or breaking a vessel but who are nevertheless performing closely related functions. Thus, the House Report states that a checker would be performing covered work if he was "*directly involved* in the loading or unloading functions . . . ".[17] Our holding is that an injured worker is a covered "employee" if at the time of his injury (a) he was performing the work of loading, unloading, repairing, building, or breaking a vessel, or (b) although he was not actually carrying out these specified functions, he was "directly involved" in such work.[18]

[4, 5] We specifically reject a theory which petitioners in the *Pfeiffer* and *Ayers Steamship* cases advance as the proper rule for cargo handling operations. They claim that the Act's coverage depends upon whether cargo has reached its shoreside "point of rest", as that term is used in the maritime industry.[19] To these petitioners, men who

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jurisdictional agreement is dispositive of the issue of coverage. It is the employee's work at the time of the injury which controls.

17. *Id.* (Emphasis supplied.) The same report also states that clerical employees who do not "participate in the loading or unloading of cargo" would not be covered by the new Act. *Id.*

18. *See* Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments,* 6 Journal of Maritime Law and Commerce 1, 10 (1974). By this holding, we do not mean to suggest that future cases may not bring to light other types of covered work which cannot be characterized as loading, unloading, repairing, building, or breaking, and which are not "directly involved" with these five types of work, but which nevertheless are sufficiently similar to fall within the Congressional scheme. No such additional category of covered work appears in the cases before us, but we will not foreclose the possibility of such categories arising in future litigation.

19. The Federal Maritime Commission has defined the "point of rest" as follows:

are handling cargo on its way to a vessel are not covered by the Act until that cargo reaches its last marshaling area prior to being taken on board a ship. Similarly, under this theory men who are unloading cargo from ships are performing covered work only until they reach the first marshaling area for cargo on shore. We are unable to find any support for such a hypertechnical construction of the 1972 Amendments.[20] In our view if Congress had wished to adopt the "point of rest" as the test for coverage, it would have made that intention clear. As it is, the "point of rest" analysis is to be found neither in the statute itself nor in the legislative history. The closest approach to such a test appears in the following passage from the House Report:

> To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area . . . [E]mployees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered . . . H.R.No.92—1441, 1972 *U.S.Code Congressional & Administrative News,* at 4708.

> For the purpose of this section, "point of rest" shall be defined as that area on the terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading. 46 C.F.R. § 533.6(c) (1975).

20. A narrowly technical construction of the Longshoremen's and Harbor Workers' Compensation Act has traditionally been disfavored. *See, e. g., Luckenbach S.S. Co. v. Norton,* 106 F.2d 137, 138 (3d Cir. 1939).

In our opinion, these remarks establish no more than that workers who bring cargo to a storage area from on board ship are covered, while those persons (generally truckers or railroad personnel) who merely receive cargo and transport it inland are not covered. The House Committee in this passage did not even mention those employees who handle cargo between the first holding area and the cargo's departure via land transportation. It is precisely the treatment of this intermediate group of workers with which we are here concerned, and this passage is totally silent as to them. Elsewhere, as we have seen, the Committee indicated that employees who are directly involved in loading or unloading will be covered by the new Act. In the absence of explicit language which would establish a "point of rest" dividing line for shoreside cargo handlers, we will apply this general test to them as well.[21]

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21. In deciding how to interpret the Amendments and their legislative history, we have remembered that this Act is to be liberally construed in favor of injured employees. *See Voris v. Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953). In our view, this principle requires us to resolve doubts as to the new Act's coverage in favor of a particular group of workers such as cargo handlers landward of the "point of rest".

Brief mention should also be made of the House Committee's announced intention "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity", H.R. No. 92-1441, *supra*, at 4708. We agree that here the Committee was speaking of one inequity of the old "water's edge" approach, under which cargo handlers would walk in and out of coverage as they moved between ship and shore. However, we see no reason to treat this statement as a comprehensive description of the new Act's coverage, with the result that only those workers who spend part of their days upon the waters would be covered. In this passage, the Committee was merely addressing itself to one anomaly which it wished to eliminate. The same paragraph clearly states that checkers would be covered by the new Act, and the Committee gave no indication that coverage would depend on whether the checkers went on board ship. The test, rather, was to be whether they were "directly involved in the loading or unloading functions". *Id.*

[6] Our interpretation of the new situs provision follows the same general lines as our construction of Section 902(3). Just as we choose to ignore the labels which an employer or a union has bestowed upon an employee, and instead rely upon the employee's work function at the time of the injury, likewise we will look past an area's formal nomenclature and examine the facts to see if the situs is one "customarily used by an employer in loading, unloading, repairing or building a vessel." The clear statutory scheme is to cover employees who are injured while performing certain types of work in an area which is customarily used for such work. Whether or not an employer or local custom has decided to designate an area as a "terminal", for example, is not dispositive of the situs issue. We will require that a putative situs actually be used for loading, unloading, or one of the other functions specified in the Act. As with the "maritime employment" test, we also interpret the Act as requiring that the situs meet the statutory requirements as of the time of the injury. It will not suffice if the area was so used only in the past, or if such uses are merely contemplated for the future.

III

THE COVERAGE ISSUE IN THESE APPEALS

[7-9] With the general tests for the amended Act's coverage in mind, we now turn to the specific facts of each of the present cases. In deciding each appeal, we must remember that the Act is to be liberally construed in favor of injured workers, *see Voris v. Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953). We are also bound by a statutory presumption that an individual claim

comes within the Act's coverage. 33 U.S.C. §290(a). Finally, we will not set aside an award made by the Benefits Review Board so long as it is supported by substantial evidence on the record considered as a whole, and so long as there is a reasonable legal basis for the Board's conclusion. *See O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508, 71 S.Ct. 470, 95 L.Ed. 403 (1951); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 478-79, 67 S.Ct. 801, 91 L.Ed. 1028 (1947).[22]

[10] A. *No. 75-1659.* Herbert Perdue was employed by Jacksonville Shipyards, Inc., as a shipfitter. On February 2, 1973, he performed repair work for a twelve-hour shift (7:00 a.m. to 7:00 p.m.) aboard an aircraft carrier which was berthed at the Mayport Naval Station in Jacksonville, Florida. At the end of the working day, Perdue took a bus to an office which his employer maintained approximately one mile from the carrier. The bus was provided by Perdue's employer, and the office was the place where Perdue had to "punch out" on a time clock before and after each shift. While alighting from the bus near the office, Perdue stumbled and injured his left knee in a fall upon the pavement. In our view, the Board should have sustained the Administrative Law Judge's determination that Perdue was not injured on a situs defined by new Section 903(a). There is literally nothing in the record to support a conclusion that the employer's office was on the navigable waters or in an "adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." The vessel

22. Although these cases were decided under the old Act, which provided for administrative adjudication by a deputy commissioner and for judicial review by a United States District Court, petitioners have offered no reason why the standard of review should be different under the present Act.

upon which Perdue was working was a mile away, and the "punch out" office was a purely clerical and administrative post separated from the waters by other facilities which likewise were not used for loading, unloading, ship repair, or shipbuilding.[23] Under no reasonable construction of the Act did this area either "adjoin" the waters or carry out any of the functions specified in Section 903(a). We reject the argument that the new Act covers every point in a large marine facility where a ship repairman might go at his employer's direction. In the words of the Administrative Law Judge below, the locus of this injury had "nothing to do with loading, unloading, building or repairing vessels" (Appendix at 19). Therefore we must reverse the Board's determination that Perdue is entitled to compensation under the new Act.

[11] B. *No. 75-2833.* Charles W. Skipper was another employee of Jacksonville Shipyards, Inc. For many years, he had been primarily engaged in ship repair work as a welder and burner. On the morning of February 8, 1974, Skipper reported for work as usual. However, instead of being assigned to his normal duties as a ship repairman, he was sent across the St. John's River to a disused marine facility called the Southside Yard. There, he was to assist in tearing down a building which had formerly housed a fabrication shop. The purpose of dismantling this structure was to salvage some steel for use in constructing a plant which would manufacture sandblasting equipment. The activities of Jacksonville Shipyards, Inc. are quite diversified, and the contemplated plant was a new business venture. Skipper himself had previously from time to time been assigned work, such as this salvage operation, which

23. The parties have stipulated that the nearest body of water was 500 yards away from the office.

did not involve ship repair. On the day in question, Skipper was injured when some beams fell from the structure during the dismantling process and several steel fragments struck his forehead. At the time of the injury, all of the shops in the Southside Yard were closed, and no repair or fabrication work was being carried out there. Occasionally, ships would still be tied up at the pier in the Southside Yard, and repairmen or other workers would be sent from the employer's active facilities to work on these ships. However, such work would have no relationship to the various disused facilities in the Southside Yard, including the former fabrication shop in question, which was located between one hundred fifty and two hundred feet from the water. On these facts, we perceive no basis for the conclusion below that Skipper's injury is compensable under the new Act. Under no reasonable view was Skipper performing ship repair work at the time of his injury, nor was he carrying out any other of the types of work which the statute specifies as "maritime employment". We further hold that this salvage gang was not engaged in any work sufficiently similar to the statutory categories to be seen as a type of shoreside employment which was fairly within Congress' intent despite not being named in the 1972 Amendments. As we have already indicated, we refuse to attach controlling weight to an employee's regular job classification. Therefore, we will not consider Skipper a "ship repairman" under Section 902(3) merely because he normally performed ship repair work. We look only to his duties at the time of the injury, and these were decidedly not within the contemplation of the statute.

[12] It is equally clear that Skipper was not injured on a situs as defined in new Section 903(a). We have

held that under Section 903(a) a covered situs must be "customarily used by an employer in loading, unloading, repairing, or building a vessel" *as of the time of the injury*. In this case, the Southside Yard shops had been inactive for approximately a year when Skipper was injured. No repair work or any other work specified by the statute was being performed in these buildings. Therefore, we must conclude that the former shops had lost their status as ship repair or shipbuilding facilities, and that Skipper was not injured on a Section 903(a) situs.

Because we reverse the administrative finding of coverage under the Act, we need not reach the other issues discussed by the parties, such as the propriety of the award which Skipper received for a facial scar and the various requests which the claimant's lawyers have made for attorneys' fees.

[13] C. *No. 75-2289*. In this case, the parties agree that the situs of the injury was within the contemplation of new Section 903(a), and the only dispute is whether the claimant was performing covered work. On April 12, 1973, Diverson Ford was injured at the port of Beaumont, Texas, while helping to secure a military vehicle to a railway flat car in preparation for its transportation inland. The vehicle in question had arrived either two or seventeen days prior to the date of the accident. Since then, it had remained in the immediate waterfront area. On the day before the injury, a gantry crane at the water's edge had lifted the vehicles onto the flat cars. Ford's work of fastening the vehicles to the flat cars was therefore the last step in transferring this cargo from sea to land transportation. On the other hand, the vehicles were not moved directly from the ship to the flat cars but instead were taken first to a storage area. There is no dispute, then,

that the "point of rest" for these vehicles had intervened since their arrival in port. However, we have today chosen not to adopt the "point of rest" theory of coverage for shoreside cargo handlers. In addition to the general reasons which we have already given for our conclusion, we cannot overlook the injustices which the proposed test would create in a case like this one. Petitioners apparently concede that Ford would be covered if his work were part of a continuous operation which began with the cargo's departure from a ship's hold. As respondents correctly point out, we are being asked to deny coverage purely because of a discontinuity in time created by the cargo's having been stored for a while along the shore. In contrast, under the test which we have adopted a shoreside worker like Ford would be covered if he was directly involved in "longshoring operations" such as unloading a ship. The work which Ford was performing was evidently an integral part of the process of moving maritime cargo from a ship to land transportation. Accordingly, we perceive an ample basis for the Board's determination that Ford was performing covered work, and we therefore affirm that decision.[24]

[14] D. *No. 75-2317*. On July 30, 1973, John L. Nulty was employed as a carpenter at a shipyard in Moss Point, Mississippi. At the time of his injury, Nulty was building a piece of woodwork which was to be installed in a new ship that had been launched but not yet commissioned. The ship was berthed about 300 feet from the

24. Petitioners' briefs are rich in references to the title of Ford's union (which was the "warehousemen's" rather than the "longshoremen's" union) and to the jurisdictional agreement between the two unions. As we have already indicated, we do not regard such matters as dispositive; instead, we look to the duties which a claimant was performing at the time of his injury.

fabrication ship where Nulty was working. The part which Nulty was fabricating was designed to hold a spare wheel on board the new ship. Most of Nulty's work was performed in the shop, although at times he would go on board a vessel to take measurements, or to install or repair some woodwork. The parties agree that a fellow employee known as a "shipfitter" would have picked up and installed the item which Nulty was building when he was injured. Under these facts, the Administrative Law Judge and the Benefits Review Board found that Nulty was working as a "shipbuilder" at the time of his injury and thus satisfied Section 902(3)'s definition of covered work. In our view, the only reasonable conclusion is that Nulty was directly involved in an ongoing shipbuilding operation. Under the test which we have adopted, then, Nulty is entitled to compensation under the new Act. We accordingly affirm the Board's finding of coverage.

[15] E. *No. 75-4112*. On May 2, 1973, Will Bryant was injured while working as a "cotton header" in a warehouse immediately adjacent to a pier in Galveston, Texas. At the port of Galveston, loads of cotton are first deposited at various shoreside warehouses by the inland shippers. The cotton is then placed upon dray wagons and taken to pier warehouses such as the one where Bryant was injured. The work performed by Bryant and other "cotton headers" is to unload the bales of cotton and stack them in pier warehouses. Two local unions, known to many as "cotton header's" and "longshoremen's" locals, have strictly divided waterfront operations between them. Generally, the cotton remains in these warehouses until other employees from the "longshoremen's" union take it on board ship. This storage period may last from less than one day to several weeks, although the average

interval is about one week. At times, the cotton will be moved from one pier warehouse to another before being taken to a ship. In such cases, dray wagons are again used to carry the cotton, and "cotton headers" unload these wagons at the receiving warehouse. Occasionally, the cotton is moved directly from a dray wagon to a ship, in which event the work is performed solely by "longshoremen". The cotton which Bryant was handling at the time of his injury remained in the same warehouse for five days before "longshoremen" arrived to take the cargo aboard a vessel. On these facts, we affirm the Board's conclusion that the injury sustained by Bryant is within the Act's coverage. The situs was a pier-side warehouse in which cotton is stored temporarily before being taken on board ships. Usually, the cargo is taken directly from the warehouse to a ship. It is clear that Bryant was working on a waterfront area "customarily used by an employer in loading . . . a vessel", and that therefore the requirements of Section 903(a) are met. We also will not set aside the Board's determination that Bryant was performing the work of an "employee" as defined in Section 902(3). We have already noted the established principle of liberal construction of this Act, and the statutory presumption that a claim is within the Act's coverage. Also, we are bound to respect the Board's conclusions if they are supported by the record and if they have a reasonable legal basis. In view of the limited nature of our review, we cannot say that the Board erred in defining Bryant's work status. As we here reiterate, we reject the notion that a "point of rest" such as the pier-side warehouse in this case marks the division between covered and uncovered work. We have no doubt that Bryant would be directly involved in "longshoring operations" if, instead

of setting the cargo down, he had handed it to a "longshoreman" for immediate loading on board a ship. The brief discontinuity in time created by the cotton's temporary storage did not alter the essential nature of Bryant's work, which was an integral part of the ongoing process of moving cargo between land transportation and a ship. Clearly, there is adequate support for a conclusion that Bryant was directly involved in "longshoring operations" and therefore falls within the terms of Section 902(3). Thus, we affirm the Board's decision that the injury in this case is covered by the new Act.[25]

IV

A CONSTITUTIONAL QUESTION

[16, 17] It is earnestly argued by Halter Marine Fabricators, Inc., and its insurance carrier that the new Act is unconstitutional insofar as it extends coverage to shipbuilding employees who are injured on land. We are reminded that traditionally a contract to build a ship has not been considered to be within the admiralty jurisdiction,[26] and that admiralty has traditionally included only those torts which occur upon the waters.[27] In the *Halter Marine* case, the employee was injured while working on land in furtherance of a shipbuilding operation. Therefore, we are told, Congress has exceeded the fixed boundaries

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25. Once again, we refuse to base our decision upon the designations of the two waterfront unions as "cotton header's" and "longshoremen's" or upon the terms of their jurisdictional agreements. Compare note 24, *supra*.

26. *See, e. g., Thames Towboat Co. v. The Francis McDonald,* 254 U.S. 242, 243, 41 S.Ct. 65, 65 L.Ed. 245 (1920).

27. *See, e. g., Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972).

of admiralty jurisdiction by covering work under a non-maritime contract which is performed on a situs outside the scope of traditional tort jurisdiction. In essense, the argument is that the sum of traditional admiralty tort and contract jurisdiction defines the absolute limits within which Congress may legislate under the Admiralty Clause.[28] We disagree with this proposition. No authority supports the notion that, in enacting a uniform compensation scheme for waterfront employees, Congress must find a "contract" or "tort" peg upon which to hang its legislation. The true analysis to be applied to such statutes is quite different. It must begin with the longstanding judicial recognition of Congress' broad powers to expand the reach of admiralty jurisdiction. Contrary to the impression created by petitioners' briefs, such judicially authorized expansion has often been geographical in nature. *See, e. g., The Genesee Chief,* 12 How. 443, 13 L.Ed. 1058 (1851), *overruling The Thomas Jefferson,* 10 Wheat. 428, 6 L.Ed. 358 (1825) (abandoning former limitation of admiralty jurisdiction to the tidewaters). The cases which approve the many changes which Congress has made in admiralty jurisdiction are replete with statements such as the following:

> The authority of the Congress to enact legislation of this nature [the Ship Mortgage Act, 46 U.S.C. §§ 911, *et seq.*] was not limited by previous decisions as to the extent of the admiralty jurisdiction. We have had abundant reason to realize that our

28. Art. III, Section 2 of the Constitution extends the federal judicial power "to all Cases of admiralty and maritime jurisdiction . . ." This clause has always been construed as empowering Congress to legislate in maritime matters. *See, e.g., Romero v. International Terminal Operating Co.,* 358 U.S. 354, 361, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959).

> experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned . . . *Detroit Trust Co. v. The Thomas Barlum,* 293 U.S. 21, 52, 55 S.Ct. 31, 41, 79 L.Ed. 176 (1934).

The Supreme Court has also consistently followed the view that this Congressional power "permits of the exercise of a wide discretion". *Panama R.R. v. Johnson,* 264 U.S. 375, 386, 44 S.Ct. 391, 394, 68 L.Ed. 748 (1924). Our conclusion is that, in the exercise of its discretion, Congress could properly determine that "new conceptions of maritime concerns" justified the extension of compensation coverage to workers in the immediate waterfront area who participate in an ongoing shipbuilding operation. As the legislative history makes clear, Congress was concerned that under the former Act maritime workers were covered over the waters but not covered while performing similar or related work on shore. The inequities of the pre-1972 Act in this regard are obvious, and we feel that this concern was a legitimate reason for Congress to exercise its discretion. We also feel that this concern was a "maritime" one within the meaning of the Admiralty Clause. We have already indicated that, in defining "maritime" concerns, we will not be limited by the rules which apply to tort and contract litigation. In the present case, we are not considering whether Congress would authorize suits upon shipbuilding contracts or whether land-based torts could be made actionable by an admiralty statute.[29] We deal only with the case before us, and in our view Congress could reasonably have felt that shipbuilding employees beside the navigable waters were performing a sufficiently maritime function to be covered

29. *See* 1A *Benedict on Admiralty* § 94, at 5-15 (6th ed. 1973).

by a revamped harbor workers' compensation statute. We therefore cannot conclude that Congress exceeded its broad discretion by extending coverage to such work.[30]

V

DIRECTOR A PROPER RESPONDENT

[18] This issue is before the Court in rather an odd fashion. In their main brief on appeal, the *Ayers Steamship* petitioners allege that the Director of the Office of Workers' Compensation Programs, United States Department of Labor, is not a proper respondent in this Court, although he could appear as *amicus curiae*. We decline to consider the merits of this cntention. First, we note that petitioners have never moved to dismiss the Director as a respondent. In our view, the relief which petitioners seek—dismissal of the Director as a party and addition of him as *amicus curiae*—is properly requested by a motion pursuant to Rule 27 of the Federal Rules of Appellate Procedure. Under that Rule, a motion is the appropriate vehicle for making "an application for an order or other relief", a category which clearly includes the request which petitioners have made for the first time in their brief. Furthermore, even assuming that petitioners have adequately raised this point, we cannot overlook the fact that in the two *Jacksonville Shipyards* cases another panel of this Court has granted motions by the Director to be added as a party respondent. These legal determinations that the Director may properly appear as a respondent must be respected by this Court. As a general rule, one panel can-

30. Because of our disposition of this issue, we need not reach the questions of whether the 1972 Amendments were an exercise of Congress' power under the Commerce Clause as well as under the Admiralty Clause.

not overrule the precedents set by another panel, absent some intervening factor such as a new controlling decision of the Supreme Court. *See Davis v. Estelle*, 529 F.2d 437, 441 (5th Cir. 1976). No such factor is present in this case, and we will therefore allow the Director to remain before this Court as a respondent.

VI

DUE PROCESS

[19, 20] In the *Pfeiffer* case, the Benefits Review Board awarded an attorney's fee to counsel for the successful claimant. The fee covered only the work which was performed before the Board, and the manner of its award was as follows. Pursuant to the applicable regulation,[31] counsel presented his request for an attorney's fee, supported by a complete statement of the services which had been performed. Finding a fee of $1,000 to be "fair and reasonable for the work done in connection with these appeals", the Board approved an award in that amount, remanding the case to the Administrative Law Judge for determination of a fee for counsel's services at that level. Petitioners opposed the award, arguing that counsel had not "properly proved" the reasonableness of the fee and that petitioners should have an opportunity to offer evidence and to cross-examine counsel on the amount of his fee. The evidentiary hearing which they requested was alleged to be a requirement of the Fifth Amendment's Due Process Clause. The board rejected these arguments, and so do we. Government officials are, of course, required to minimize the risks of error and unfairness in

31. 20 C.F.R. § 702.132 (1975). The statutory basis for this regulation is 33 U.S.C. §§ 928(a) & (c), *as amended*.

the procedures by which one is deprived of life, liberty, or property. *See, e. g., Goss v. Lopez,* 419 U.S. 565, 581, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *Mitchell v. W. T. Grant Co.,* 416 U.S. 600, 609-10, 618, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974). We feel that these risks were adequately minimized by the procedures which the Board followed. The Board was clearly able to evaluate the services which counsel performed before it. It was the Board which read counsel's briefs and observed his representation of the claimant in the administrative appeal. Thus, the fee which the Board granted was carefully limited to those services of which it had first-hand knowledge. Especially in view of the extremely generalized nature of petitioners' attack upon the fee's reasonableness, we cannot say that disposing of petitioners' objections without an evidentiary hearing was a violation of the Due Process Clause.

VII

CONCLUSION

For the foregoing reasons, the decisions of the Benefits Review Board in Nos. 75-1659 and 75-2833 are REVERSED. The Board's decisions in Nos. 75-2289, 75-2317 and 75-4112 are AFFIRMED in all respects.

APPENDIX B

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
WASHINGTON, D. C. 20210

Case No. 74—LHCA—181

Formerly Case No. 8—18874

In the Matter of

DIVERSON FORD, Claimant

v.

P. C. PFEIFFER COMPANY, Employer
TEXAS EMPLOYERS' INSURANCE ASSOCIATION, Carrier

J. Weldon Granger, Esq.
Dowman, Jones, Musslewhite and Schechter
1200 Houston First Savings Bldg.
711 Fannin
Houston, Texas 77002
For the Claimant

W. Robins Brice, Esq.
Royston, Rayzor, Cook & Vickery
3710 One Shell Plaza
Houston, Texas 77002
For the Employer
and Carrier

Joshua T. Gillelan, Esq.
Solicitor of Labor
U. S. Department of Labor
Washington, D.C. 20210
For the Director, Office of Workmen's Compensation Programs

Before: FRANK W. VANDERHEYDEN
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

Pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensataion Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.* (hereinafter Act and the Rules and Regulations promulgated thereunder, a hearing in the subject matter was held before me on June 12, 1974, in Beaumont, Texas. All parties were represented by counsel. A designee of the Solicitor of Labor appeared and participated on behalf of the Director of the Office of Workmens' Compensation Programs pursuant to 20 CFR 702.333(b). At the hearing no witnesses were called. By stipulation of all parties including, but not limited to, the Claimant, the case was submitted on a document entitled Agreed Statement of Facts and stipulations (JX-Joint Exhibit-1) which was received into evidence (hereinafter sometimes referred to as Stipulation) and oral stipulations. The parties were given a full opportunity to be heard and to make oral arguments. Thereafter, the parties filed proposed findings and briefs which were duly considered. Immediately after the hearing, accompanied by all counsel, I went to City Dock No. 2,

Port of Beaumont, and reviewed the area in question. Also subsequent to the hearing, I requested counsel for the parties to clarify an aspect of the Claimant's employment which was done by another document designated as Supplemental Agreed Statement of Facts and Stipulations (JX 2: hereinafter sometimes referred to as a Supplemental Stipulation).

The single issue in this matter is whether or not the claim for compensation comes within the purview of the Act. The Claimant and the Director of the Office of Workmen's Compensation Programs (hereinafter Director) take the position, that on the facts set forth below, the Claimant is an "employee" for reason that he meets the definition of such in the Act, with additional support for this to be found in the legislative history. For the same reasons, P.C. Pfeiffer Company and Texas Employers' Insurance Group (referred collectively hereinafter as Employer) contend that the Claimant is not an "employee."

Upon the entire record in this case I make the following findings of fact, conclusions of law and order:

Facts

The pertinent facts, abstracted from the aforementioned Stipulations (altered slightly in form only) are as follows:

The Claimant, Diverson Ford, sustained an accidental injury on April 12, 1973, in the course and scope of his employment for the Employer, when he struck the tip of his second (middle) finger, left hand, with a hammer. The insurance carrier for the Employer's liability under workmen's compensation is the Texas Employers' Insurance Association. It was agreed that notice of injury was

timely given; that claim for compensation was timely filed; that the claim for compensation was timely controverted; and that the Employer furnished medical care for the Claimant.

During the year preceding injury, Claimant had an average weekly wage of $57.83; that his compensation rate under the Act, if applicable, would be $57.83 per week for total disability and $38.56 per week for permanent partial disability. Following the injury Claimant sustained a period of temporary total disability from April 12, 1973, to May 7, 1973, a period of four weeks. The Employer paid Claimant compensation for temporary total disability for four weeks at the weekly rate of $34.52 per week in the total sum of $138.08 under the Workmen's Compensation Act of Texas.

The accident which resulted in the injury occurred between the rails of a gantry crane on City Dock No. 2 at the Port of Beaumont, Texas, which is an open concrete apron dock approximately 170 feet in width. The gantry crane runs on permanent rails along the edge of the dock, with two railroad tracks running within the span of the gantry and thus under the boom. The rail of the gantry nearest the water is approximately two feet, seven inches from the edge of the dock, with the distance between the rails of the gantry being 32 feet, two inches. This gantry crane is used in the loading and unloading of vessels, but when no vessel loading or unloading operations are in progress, it is also used in the loading and unloading of railroad cars.

As an attachment to the Stipulation, the parties submitted an aerial photograph of the site in question, designated as Exhibit 1, which photograph purports to show

the location of the gantry crane, the concrete dock apron and the vehicle storage area, respectively numbered on the aforementioned Exhibit 1, 2, and 3. Also attached to the Stipulation was Exhibit 2, which was a sketch of the pertinent areas mentioned above, which locations were indicated by the same numbers. At the time the photographs was taken a vessel was at the berth adjacent to the crane and vehicles were stored on the dock apron itself. Neither of these two noted conditions existed on the morning of Claimant's accident.

Claimant was working as a member of a securing gang out of a warehousemen's local and was engaged in fastening military vehicles onto railroad flat cars in the area between the rails of the gantry crane when the accident occurred. On the date of Claimant's injury, no vessel was docked at City Dock No. 2, and the gantry crane was not in use for any purpose. On the previous day, the crane had been employed to load heavy military vehicles out of a nearby storage area onto railroad flat cars for shipment inland. Some of the military vehicles had been towed or driven from a yard storage area (No. 3 on Exhibits attached to Stipulation) to a spot within the reach of the gantry crane (No. 2 on Exhibits attached to Stipulation) and then had been lifted onto the railroad cars for ultimate transportation to an inland arsenal.

Additionally, Claimant would testify that some, but not all, of the military vehicles loaded aboard the railroad cars came from storage on the dock apron itself. The railroad cars remained overnight under the gantry crane, and Claimant was employed on the following morning as a member of a warehousemen's gang for the sole purpose of securely fastening the military vehicles to the

railroad cars. Claimant would testify further that he had been employed in the work of bringing the vehicle back to the crane and placing it on to the rail car on the day prior to his accident. However, the payroll records of the Employer indicate that Claimant was not employed at all on the day prior to his accident. These records indicate Claimant was employed on April 9 and 10, 1973, in a warehouseman capacity shifting bagged cargo, that he was not employed on April 11, 1973, and that he was employed again in a warehouseman capacity on April 12, 1973, to secure the military vehicles onto the railroad cars.

The eight vehicles on which the Claimant's securing gang were working had been delivered to the Port of Beaumont on prior occasions and placed in a vehicle storage area near the concrete apron of City Dock No. 2. Some, but not all, of the vehicles may have been stored on the dock apron itself. Seven of the vehicles had been brought to Beaumont by the SS THOMAS JEFFERSON, which sailed from Beaumont on March 26, 1973, and the vehicles had been discharged to the storage yard on March 25 and 26, 1973, seventeen days before Claimant's accident. One of the vehicles had been brought to Beaumont by the SS JAMES, which had completed discharging on the morning of April 10th and had sailed from Beaumont on the afternoon of April 10th, 1973, two days before Claimant's accident. The exact military vehicle on which Claimant was working at the moment of his accident has not been identified but it definitely was one of the eight described above which had come from the vehicle storage yard or from the dock storage area itself. The vehicle on which Claimant was working had been brought from the storage area and loaded aboard the rail

flatcar on the day prior to the accident. On the morning of the accident Claimant was engaged solely in securing the vehicle to the rail car for shipment inland.

Claimant was employed by the Warehouse Division of the Employer, a multi-faceted corporation which in its various capacities performs warehousing services for the Port of Beaumont, contract stevedoring services for various shipping lines and agencies, and shipping agency services for various shipping lines and vessels. Those employees of the shipping agency and contracting stevedoring division of the Employer do have occasion to work aboard vessels on the navigable waters of the United States in the course of their employment, but men employed by the Warehouse Division of the Employer and working out of the warehousemen's local union never go aboard vessels or otherwise work on the navigable waters of the United States. However, Claimant has worked in the stevedoring division of the Employer aboard deep sea vessels as well as for other stevedoring companies within the Port of Beaumont.

An individual obtains warehouse work by reporting to the warehousemen's union hall, on the morning he wishes to work where he may be chosen by the gang foreman for one of the gangs according to his seniority. If an individual wishes to do longshore work, he reports to one of the longshoremen's union halls, when he may be chosen by the gang foreman for longshore work which had been ordered previously from the longshoremen's local union business agent by one of the stevedoring companies. There is nothing to prevent a man who is not chosen by a gang foreman for warehouse work on a given day from going to the longshoreman's union hall in hope of obtaining a spot from a gang foreman in an unfilled longshore

gang. Conversely, a man who is not chosen by a gang foreman for a longshoring job on any given day may go to the warehouse local in hope of finding a warehouseman's gang unfilled for that particular day.

The Employer determines the number of gangs of warehousemen necessary to perform the ordered work within the ordered time period, and calls the warehousemen's local union business agent to request the necessary number of gangs for the following day's work. A warehouse gang usually consists of five men, including the foreman. An Employer cannot choose or order any particular gang foreman or any individual to work in a particular work classification.

Gangs hired from the longshore locals cannot be assigned to do warehousemen's work, and gangs hired from the warehouse local cannot be assigned to do longshoremen's work. On no single day did Claimant work both as a warehouseman and as a longshoreman.

In the year prior to his injury on April 12, 1973, Claimant worked thirty-seven days as a warehouseman and two days as a longshoreman for the Employer. He also worked two days as a warehouseman, and three days as a longshoreman for J. J. Flanagan Company, and two days as a longshoreman for Biehl and Company. Thus he worked a total of 39 days as a warehouseman and 7 days as a longshoreman. He also worked for a beer distributing company and for a construction company in shoreside employment during the year prior to his injury.

The Employer's Warehouse Division is located within the offices of the Port of Beaumont Navigation District and thus is physically separated from the stevedoring division of the Company. All warehouse operation orders

are received by the Employer from the Port of Beaumont on the basis of an exclusive contract between the Employer and the Port.

When a government cargo is involved, whether inbound or outbound, from the Port of Beaumont, the Port is paid for these warehousing services by the Government. When nonmilitary cargo is involved, the Port is paid for these warehousing services by the shipper if the cargo is outbound and by the receiver of the cargo if it is inbound. The Employer's stevedoring operations are conducted directly for shipping agencies or vessels on the basis of bidding for the particular work to be performed. Whenever the peculiar nature or size of the cargo or the exigencies of scheduling require that cargo be loaded directly from a railroad car or truck to a vessel or directly from the vessel to a railroad car or truck, such work is jurisdictionally allocated to the deep sea longshoremen and is necessarily performed by men working out of the deep sea local unions for stevedoring companies. No men working out of the warehousemen's local unions are involved at all in such loading or unloading operations, nor are the Employer's warehouse management personnel involved in such operations.

The Employer had not performed the stevedoring services for either vessel which delivered the military vehicles on which Claimant was working at the time of his accident. The Employer's agency division had performed ship's agent services, but not stevedoring services for the SS THOMAS JEFFERSON, which sailed from Beaumont on March 26, 1973, but the Employer had no connection whatever with the call of the SS JAMES at the Port of Beaumont which ended April 10, 1973. No

employees of the Employer had participated in any way in the physical removal of the military vehicles from the ocean going vessels or their transfer to the vehicle storage yard within the terminal area. The warehouse division of the Employer was retained to load and prepare the vehicles for shipment inland by rail, at which task Claimant was employed when the accident occurred resulting in his injury.

Claimant was working out of Warehousemen's Local 1316. Men working out of the Warehousemen's Local at the warehousemen's rate of pay never go aboard vessels and never approach a vessel's cargo whip. Warehousemen are never involved in the moving of cargo directly from a vessel to a point of rest in the warehouse or storage area or directly from a vessel to railroad cars or trucks and they are never involved in the moving of cargo from a warehouse or storage area point of rest directly to a vessel or from railroad cars or trucks directly to a vessel. Such activities are allocated jurisdictionally to the men working out of Longshoremen's Deep Sea Local Nos. 325, 1306 or 1610. However, counsel were in accord that the Stipulation shall not be interpreted as being an agreement by the Claimant that he was not engaged in the loading or unloading of a vessel for purposes of the Act. Rule No. 1 of the agreement governing the relationship between the Warehousemen's Local Union and the warehouse employers is as follows:

> "Warehouse workers shall have jurisdiction over all warehouse work done by the above named employer or employers. They shall have jurisdiction over all carloading and unloading from railroad car to pile and from pile to car, loading and unloading trucks and vehicles when under the jurisdiction of the

> employer, sewing sacks, recooperage, piling dunnage, segregating and chopping of all freight and bracing all cars when under the jurisdiction of warehouse locals, sweeping and cleaning of warehouse when under the jurisdiction of employer and all mechanical equipment when under the jurisdiction of the employer."

The Deep Sea Longshore agreement provides, with regard to the definition of longshoring work (as opposed to warehouse, quaymen or other type work), that:

> "Longshore work shall constitute the loading and discharging of all sea-going vessels, railroad cars at wharf, fitting ships for grain, livestock, building magazine rooms or securing cargoes of any kind, dismantling ships of any kind of fittings, shifting of cargoes, coal or coke, and all labor connected with the loading and discharging of ship, * * * The important distinction being whether or not the freight is handled once, that is to say, laid down or piled. * * *"

These contractual provisions reflect the work arrangement described above, whereby no men working out of the Warehousemen's local are engaged in moving cargo directly to or from ships and no deep sea longshoremen handle cargo shoreward after it has been laid down or piled. However, it is expressly agreed, that nothing in the Stipulation shall preclude Claimant from asserting that he was engaged in the loading or unloading of a vessel for purposes of the Act.

It was also stipulated orally between the parties at the hearing, and I so find, that the Claimant sustained permanent partial disability to the second (middle) finger of

his left hand to the extent of twenty percent over a six-week period of $38.56 per week for a total amount of $231.36.

I find the foregoing facts have been established by the entire record in this case.

Opinion

With regard to the issue presented, the pertinent provisions of the Act are as follows:

Section 902. Definitions

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged in by the master to load or unload or repair any small vessel under eighteen tons net.
>
> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading and unloading, repairing, or building a vessel).

Section 903. Coverage

> (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf,

> dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

The legislative history of the Act concerning the point in contention discloses the following:

> The intent of the Committee is to permit a uniform compensation system to apply to employees *who would otherwise be covered* by this Act for part of their activity. To take a typical example, cargo whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does *not* intend to cover employees who are not engaged in loading, *unloading*, repairing, or building *a vessel, just because* they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up *stored cargo for further trans-shipment* would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. *Likewise* the Committee has *no* intention of extending coverage under the Act to individuals who are *not* employed by a person who is an *employer*, i.e., a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus an individual employed by a person *none* of whose employees work, in whole or part, *on navigable waters*, is not covered *even if* injured on

> a pier adjoining navigable waters. S. Rep. No. 92-1125, 92d Cong. 2d Sess. 13; H. Rep. No. 92-1441, 92d Cong. 2d Sess. 10-11 (1972). (emphasis supplied)

One of the main reasons for the 1972 amendments to the Act is rooted in those decisions which premised coverage upon situs alone. To illustrate, in *Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946), it was held that the Act did not cover a longshoreman injured on a dock even if the injury was caused by a vessel on navigable waters. This distinction between a longshoreman's activities aboard a vessel and his work on the pier was reaffirmed in *Nacirema Operating Co. v. Johnson,* 396 U.S. 212, 224 (1969), which was the Court's last enunciation on the point before the Act was amended in 1972. There the Court reiterated that Congress chose the line separating water from land at the edge of the pier. "The invitation to move the line landward must be addressed to Congress, not to this Court". To correct an apparent inequity, depending upon the happenstance of where a longshoreman was injured, Congress, among other changes, amended the Act to extend the geographic coverage landward. Congress also altered the definition of "employee" from a negative concept, where certain classes of people were excluded, to a positive statement setting forth certain conditions that a claimant must meet. Capsulizing the character of the changes in Sections 902(2), (3) and 903, it would appear fair to state that while "situs" was expanded, "status" was constricted. The language of these amended Sections, coupled with the legislative history, however, make it palpable that Congress, in its effort to provide a uniform compensation system, did not intend to open the floodgates of coverage to any and all who met with injury or death upon the newly extended area.

There is agreement between the parties, and I so find, that the Claimant sustained his injury upon an area which meets the requirements of Section 903(a). The parties begin with the absolute certainty, however, that the case hinges completely upon the definition of "employee". In the main this is so but for reasons mentioned below there are other considerations which are of some moment to the resolution of the issue.

Admittedly, labels attached to a job are not decisive and it is the nature of the work performed by the Claimant that is important. *Olvera v. Miachalos,* 307 F. Supp. 9 (S.D. Tex. 1968). Nonetheless, a job title at times is of assistance in determining the nature of a claimant's work. Also helpful in this respect are the terms of a union agreement. The contract provisions of the Warehousemen's and Deep Sea Longshore Agreement, above mentioned, and in fact the work performed, disclose a dichotomy which delineates distinctly the duties between longshoremen and warehousemen in the Port of Beaumont. The Deep Sea Longshoremen handle all loading and unloading of ships and are not involved in any movement of cargo on land after it has been removed from the ship and taken to a place storage or rest in a warehouse or terminal area. The longshoremen in loading a vessel transport the cargo solely from its place of storage in the warehouse or terminal area to the side of the vessel and place it aboard the ship. Warehousemen do not remove cargo from a vessel, or after its removal from the vessel to a warehouse or storage area. Nor do they move cargo from a warehouse or storage area point of rest directly alongside the vessel nor place it aboard same. Such work is exclusively within the jurisdiction of the Deep Sea Local.

In drafting the definition of "employee" we must indulge in the presumption that Congress in its wisdom selected such significant words or phrases as "engaged in", "maritime employment" and "longshoreman" most carefully. For example, rather than choose a word of flexible meaning such as "affecting", the phrase "engaged in" was selected, with the reasonable implication being that a claimant must have something more than an indirect relationship with "maritime employment". The term "longshoreman" poses less of a problem and is deemed generally to be a laborer employed about the wharves of a port, especially in loading and unloading vessels. *Sulovitz v. U.S.*, 64 F. Supp. 637 (E.D. Pa. 1945).

No general rule had been fashioned sufficiently comprehensive to describe all the types of employment which are deemed maritime in nature. Outside of certain generally recognized fields, each case must be determined by its particular facts and circumstances. *Ellis v. Gulf Oil Corporation*, 48 F. Supp. 771, 772 (D.N.J. 1943). However, "[t]he management of the vessel, the loading [unloading] of same, the care of its equipment and cargo, the performance of any task essentially to enable it to accomplish its purpose upon navigable waters are within the term 'maritime employment'." *Massman Const. Co. v. Basset*, 30 F. Supp. 813, 815 (E.D. Mo. 1940), *rev'd. on other grounds*, 120 F.2d 230 (8th Cir. 1941), *cert. denied*, 314 U.S. 648 (1941).

Slight succor is found in general statements, however. The key to the present conundrum is to lay the facts concerning Claimant's employment and the Employer's activities alongside the statutory definitions and the legislative history. In the Senate and House Reports aforementioned, it is stated expressly that the Committee did

not intend to cover employees who are not engaged in unloading a vessel just because they are injured in an area adjoining navigable waters and whose only responsibility is to pick up stored cargo for further trans-shipment. Likewise the Committee had no intention of extending coverage to individuals who were not employed by a person who was an employer. For example, an individual employed by a person none of whose employees work in whole or in part, on navigable waters, even if injured on a pier adjoining navigable waters.

On the facts before us, Claimant and his warehousemen coworkers were not, as I interpret the definitions aforementioned and the legislative history, engaged in either "maritime employment" or in "unloading" a vessel. The duties of Claimant and his fellow warehousemen, by the terms of the collective bargaining agreement, and in actuality, did not require them and, in fact, prohibited them from performing any unloading of vessels.

We are reminded in Claimant's brief that "any intermediate step prior to the final removal from the maritime facility is to be considered a 'maritime operation' under the Act". This conclusion is arrived at apparently because the Claimant was working near the water and alleged to be engaged in the final stages of unloading a vessel, a pregnant idea distinguished more by the ingenuity of its conception than by the strength of its persuasion. Rather than "unloading" a vessel, the facts could support reasonably the conclusion that the Claimant was engaged in the first stages of loading cargo for a consignee, which cargo had already been physical or constructively delivered to such party. In this regard, it is of interest to note that the Stipulation states the receiver of the

cargo pays for the warehousing services. Stripped to its essentials, Claimant's duties were confined completely to land, where on the day in question his sole function was to affix the cargo (military tanks) to railroad flatcars for trans-shipment inland. As such, Claimant's "maritime employment" was nebulous to nonexistent.

I find also that the Claimant was not working for an "employer" as this term is defined in Section 902(4), and as amplified by the Committee Reports, because of the absence of employees "employed in maritime employment". The record shows that employees of the employer had not performed any of the stevedoring services concerning the cargo, nor were such employees involved in transferring the cargo, on which Claimant was working subsequently when injured, to the storage yard within the terminal area. The Employer had merely the warehousing contract to prepare the vehicles for shipment inland by rail. These facts also appear to fall within that portion of the Committee Reports which states: "Thus, an individual employed by a person none of whose employees work, in whole or in part, or navigable waters, is not covered even if injured on a pier adjoining navigable waters".

To the writer's knowledge none of the jurisdictional questions under the aforementioned Sections of the Act have decided to date by the Benefits Review Board or the appropriate Federal Circuit Court of Appeals. Of those decisions on the Administrative Law Judge level possibly analogous to the instant matter is *Giacomo Avvento v. Hellenic Lines and Liberty Mutual Insurance Company*, 74-LHCA-63, which is cited in, and attached to, the Director's brief to support the position Claimant is an "employee". However, there are at least two power-

ful and persuasive distinctions between *Avvento* and this case. First, and most important, in *Avvento* the claimant, a "legman" engaged in loading cases of sardines into a truck on the particular day of the accident, was a *longshoreman* and because of the interchangeability of jobs, could within the same day be assigned to the task of directly unloading a vessel. Not so with the Claimant here, whose duties were that of a warehouseman, pure and simple, having an attenuated link at best with the vessel from which cargo emanated. Second, the longshoreman in *Avvento* was found not to be picking up "stored cargo". Here the vehicles the Claimant was affixing to the flatcars could, on the facts set forth in the Stipulation, be reasonably considered, and I so find, to be stored cargo. More recently, on the administrative law level, there was decided *James R. Bailey v. Nacirema Operating Company, Inc. and Liberty Mutual Insurance Company*, 74-LHCA-117, which in some regard is similar to the instant matter and also involved a jurisdictional issue. Again, however, the facts are significantly different. In *Bailey*, though engaged on the day of the accident in a process involving, "stuffing", i.e., loading logs onto a Moffet Trailer, the claimant was a *longshoreman*, "frequently assigned to a regular longshoremen's gang, for work either aboard ship or on a dock, handling cargo". *Litwinowicz v. Weyerhaeuser Steamship Company*, 179 F. Supp. 812 (E.D. Pa. 1959), is cited also in the Director's brief, for the proposition that "loading" should not be given a niggardly construction. However, there the plaintiff, a *longshoreman*, was injured while working in a railroad car placing wooden chocks under a draft of steel beams *preparatory* to their being hoisted *aboard* a ship. These facts are strikingly dissimilar from those before us.

Related in the briefs of counsel for Claimant and the Director are the following cases: *Voris v. Eikel,* 346 U.S. 328, 333 (1953); *Young & Co. v. Shea,* 397 F.2d 185, 188 and 404 F.2d 1059, 1061 (5th Cir. 1968); *Calbeck v. Travelers Insurance Co.,* 370 U.S. 114, 130 (1962). These are mentioned for the thesis that the Act, should be construed liberally in favor of injured workmen and that it should be read expansively. To these one might add, to mention a few, *Reed v. The S. S. Yaka,* 373 U.S. 410, 415, (1963); *Michigan Mutual Liberty Co. v. Arrien,* 344 F.2d 640, 647 (2d Cir. 1965) and *Gibson v. Hughes,* 192 F. Supp. 564, 571 (S.D.N.Y. 1961). Notwithstanding that these cases were decided before the Act was amended it is conceded that it remains a remedial statute to be construed broadly. However, such generous construction should not be employed to frustrate the Congressional intent as evidenced by new definition of "employee" and the Committee Reports.

Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 460, 474 (1947) is also cited for the Section 20(a) presumption "that a claim comes within the provisions of this Act." However, the prefatory language to this give rise to such presumption only "in the absence of substantial evidence to the contrary". The record will show, and I so find, that the Employer has come forward with such evidence.

From the foregoing findings of facts, conclusions of law and upon the evidence contained in the record as a whole I make the following:

Order

The claim for compensation by Diverson Ford under the Longshoremen's and Harbor Workers' Compensation

Act against P. C. Pfeiffer Company, Inc., and Texas Employers' Insurance Association is hereby denied.

/s/ FRANK W. VANDERHEYDEN
Frank W. Vanderheyden
Administrative Law Judge

Dated: August 29, 1974
Washington, D. C.

APPENDIX C

U. S. DEPARTMENT OF LABOR
Benefits Review Board
WASHINGTON, D.C. 20210

DIVERSON FORD, Claimant-Petitioner,

v.

P. C. PFEIFFER COMPANY, INC.,

and

TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Employer/Carrier-Respondents

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Petitioner

v.

P. C. PFEIFFER COMPANY, INC.

and

TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Employer/Carrier-Respondents

BRB Nos. 74-191 and 74-191A

DECISION

Appeal from Decision and Order of Frank W. Vanderheyden, Administrative Law Judge, United States Department of Labor.

J. Weldon Granger (Downman, Jones and Schechter), Houston, Texas, for the claimant.
W. Robins Brice and E. D. Vickery (Royston, Rayzor, Cook and Vickery), Houston, Texas, for the employer/carrier.

Joshua T. Gillelan (William J. Kilberg, Solicitor of Labor, Marshall H. Harris, Associate Solicitor), Washington, D.C., Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Washington, Chairperson:

These appeals by the claimant and the Director, Office of Workers' Compensation Programs, are from the decision and order (74-LHCA-181) of Administrative Law Judge Vanderheyden denying compensation benefits pursuant to a claim filed under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter referred to as the Act).

Claimant, employed as a warehouseman, injured a finger in 1973 while securing military vehicles onto railroad cars located on a concrete aprondock for inland shipment. The vehicles with which claimant was working had been unloaded from ships between two days and two and one one-half weeks prior to the injury. The employer and carrier (hereinafter referred to as the employer) controverted the claim on the sole ground that the claim did not come within the provisions of the Act.

The administrative law judge found that the claimant was not an employee as described in Section 2(3) of the Act, 33 U.S.C. §902(3), and that the employer was not an employer as described in Section 2(4) of the Act, 33 U.S.C. §902 (4), and therefore denied compensation. The claimant and the Director appeal alleging that the 1972 amendments to the Act expanded coverage inland

to include anyone, such as the claimant, engaged in longshoring operations.

Employer's argument that neither the claimant nor any other of the employer's employees were working over navigable waters on the date of the injury assumes that the coverage of "navigable waters" has come through the amendments unscathed. Such an assumption is unfounded since the language of amended Section 3(a) of the Act, 33 U.S.C. §903(a), and amended Section 2(4) of the Act, 33 U.S.C. §902(4), both apply to employment "upon the navigable waters of the United States (*including* any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)". (emphasis added).

The employer undisputedly had employees working in a geographical area within the scope of Sections 3(a) and 2(4). The Board finds it unnecessary to find, as urged by the employer, that at least one employee of the employer must be actually working *over* the water with a ship at the dock before an employer is determined to have employees employed over navigable waters within the provisions of amended Section 2(4) of the Act. The Board's inquiry is therefore directed to the claimant's duties on the date of the injury to determine whether he was engaged in maritime employment, because Section 3(a) having been satisfied, a determination of coverage of an "employee" under Section 2(3) will implicitly satisfy the requirements of Section 2(4). *Harris v. Maritime Terminals and Aetna Casualty*, 1 BRBS 301, BRB No. 74-178 (Feb. 3, 1975).

Section 2(3) of the Act, as amended, defines an employee as:

> Any person engaged in maritime employment, *including* any longshoreman or any other person engaged in *Longshoring operations* . . . . (emphasis added).

This Board has found that longshoring operations include intermediate steps subsequent to unloading cargo, still in maritime commerce, from a ship and prior to its removal from the terminal for further transshipment. *Avvento v. Hellenic Lines Ltd.*, 1 BRBS 174, BRB No. 74-153 (Nov. 12, 1974). The very language of amended Section 2(3) includes anyone engaged in longshoring operations in the definition of an employee. The Board finds that the cargo with which the claimant was working was still in maritime commerce. *Avvento, supra; Adkins v. I.T.O.*, 1 BRBS 199, BRB No. 74-123 (Nov. 29, 1974). The claimant in *Avvento* was performing the same type of work as here, loading cargo which had previously been unloaded from a ship into a truck for removal from the pier. The fact that the claimant in *Avvento* was hired as a longshoreman and the claimant here was hired as a warehouseman is in no way a distinction under the Act. *See Coppolino v. I.T.O.*, 1 BRBS 205, BRB No. 74-136 (Dec. 2, 1974). It is the function of the employment, such as longshoring operations, and the situs of the injury that is controlling, not the title of the position.

The Board does not subscribe to a "point of rest" determination that the moment that cargo is unloaded from a ship and placed onto the dock, it ends its maritime nature. *Avvento, supra.* Any intent to limit coverage to persons actually involved with the loading and unloading of ships between the stringpiece and the hold of the ship could have been so expressed by Congress. *Coppolino, supra.*

The Board finds that the administrative law judge erred in finding that the claimant was not engaged in employment within the scope of the Act. Therefore, the decision and order appealed from is reversed and the case is remanded to the office of the Administrative Law Judges for further appropriate action.

/s/ RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

We Concur:

/s/ RALPH M. HARTMAN
Ralph M. Hartman, Member

/s/ JULIUS MILLER
Julius Miller, Member

Dated this 21st day
of March, 1975

SERVICE SHEET

BRB Nos. 74-191-191A

DIVERSON FORD

v.

P. C. PFEIFFER CO., INC,

and

TEXAS EMPLOYERS' INSURANCE ASSOCOATION

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS (74-LHCA-181)

Decision sent to all parties:

J. Weldon Granger, Esquire -Certified Mail-
Downman, Jones & Schechter
1200 Houston First Savings Building
711 Fannin
Houston, Texas 77002

W. Robins Brice, Esquire -Certified Mail-
E. D. Vickery, Esquire
Royston, Rayzor, Cook & Vickery
Suite 3710
One Shell Plaza
Houston, Texas 77002

Mr. Marshall H. Harris -Certified Mail-
Associate Solicitor
U. S. Department of Labor
Room N-2716 New Labor Building
Washington, D. C. 20210

Mr. Lee H. Hollis
Deputy Commissioner
U. S. Department of Labor
Employment Standards Administration
Room 212 U. S. Post Office Bldg.
601 Rosenburg
Galveston, Texas 77550

Mr. Stephan Gordon
Chief Administrative Law Judge
Office of Administrative Law Judges
U. S. Department of Labor
1111-20th Street, N.W.
Suite 720
Washington, D.C. 20036

Mr. Herbert Doyle
Director, Office of Workers'
Compensation Programs
U. S. Department of Labor
Room 310
711 - 14th Street, N.W.
Washington, D.C. 20210

APPENDIX D

U. S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
WASHINGTON, D.C. 20210

Case No. 74-LHCA-89
(Formerly Case No. 8-18217)

In the Matter of

WILL BRYANT, Claimant

v.

AYERS STEAMSHIP COMPANY, Employer

TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Carrier

Arthur L. Schechter, Esquire
Downman, Jones & Schechter
1200 Houston First Savings Building
Houston, Texas 77002

For the Claimant

E. D. Vickery, Esquire
W. Robins Brice, Esquire
Royston, Rayzor, Cook & Vickery
3710 One Shell Plaza
Houston, Texas 77002

For the Employer
and Carrier

William J. Kilberg, Esquire
Solicitor of Labor
Joshua T. Gillelan, II, Esquire
Attorney
United States Department of Labor
Room 4221, Main Labor Building
14th & Constitution Avenue, N.W.
Washington, D.C. 20210

For Director
Office of Workmen's Compensation
Programs

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This is a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, as amended (hereinafter referred to as the Act). The sole issue for determination is jurisdiction, i.e. whether a cotton header, injured while unloading cotton bales from a dray wagon, is subject to the provisions of the Act. All facts, including disability and compensation due if Will Bryant (Claimant) is an employee covered by the Act as amended in 1972, have been stipulated by the parties.[1]

1. The parties have entered into three signed stipulations which are hereby incorporated as part of the record as follows:
Stipulation No. 1, entitled, "Agreed Statement of Facts and Stipulations", executd by Employer, Insurance Carrier and their attorneys on September 24, 1973, and by the Claimant and his attorney on October 7, 1973 (hreinafter referred to as "Stip. 1" followed by the appropriate page of that Stipulation).
Stipulation No. 2, entitled, "Supplemental Agreed Stipulation of Fact", executed by Employer, Insurance Carrier and their attorneys on December 13, 1973, and by Claimant and his attorney on December 13, 1973 (herinafter referred to as "Stip. 2" followed by the appropriate page of that Stipulation).
Stipulation No. 3, also entitled "Supplemental Agreed Stipulation of Fact", executed by Claimant and his attorney on May 3, 1974, and by Employer, Insurance Carrier and their attorneys on May 7, 1974 (hereinafter referred to as "Stip. 3" followed by the appropriate page of that Stipulation).

A hearing was scheduled for June 4, 1974, in Houston, Texas, but was cancelled at the request of the parties.[2] A waiver of Oral Argument, duly signed by counsel for the parties was also filed and is hereby incorporated in the record as ALJ Exh. 2. By letter dated July 3, 1974, the parties, including the late Honorable James B. Johnston, were given confirmation of the telegraphic notice of cancellation of the notice of hearing; that the request of the parties that this case be submitted on the agreed stipulations of fact without formal hearing and/or oral argument was granted; and a briefing schedule was set forth. A copy of the letter dated June 3, 1974, is hereby incorporated in the record as ALJ Exh. 3.

Claimant initially filed a brief with the Deputy Commissioner entitled, "Brief and Argument in Support of Will Bryant's Claim for Compensation" and Employer-Carrier filed a brief with the Deputy Commissioner entitled "Brief of Employer and Insurance Carrier", received December 27, 1973. Thereafter, Employer and Insurance Carrier filed with this Office a Motion to Dismiss and/or

2. The late Honorable James G. Johnston, Associate Solicitor for Employee Benefits, in a letter to the undersigned dated May 24, 1974, with copies to counsel for the parties, concurred that the three stipulations, more fully described in n. 1, *supra*, "set forth all relevant facts of which we are aware with respect to the claim; none of us desires to adduce any further evidence. Thus on behalf of all parties, we would like to waive, pursuant to 20 C.F.R. §702.346, the formal hearing which has been scheduled to be held in Houston on June 6, 1974." The letter dated May 24, 1974, is hereby incorporated in the record as ALJ Exh. 1.

for Summary Judgment for Lack of Jurisdiction, hereby incorporated in the record as ALJ Exh. 4. Pursuant to the briefing schedule set forth in ALJ Exh. 3, the Director timely filed a brief entitled "Memorandum of the Director, Office of Workmen's Compensation Programs, in opposition to Employer's and Insurance Carrier's Motion to Dismiss and/or For Summary Judgment". Counsel for Claimant, by letter dated June 13, 1974, addressed to the undersigned, (hereby incorporated in the record as ALJ Exh. 5), advised that Claimant did not wish to file any additional briefs; however, counsel for Claimant by letter dated July 11, 1974, addressed to the undersigned (hereby incorporated in the record as ALJ Exh. 6) set forth the amount claimed as an attorney's fee and medical expenses supported by his signed statement of time and work (hereby incorporated in the record as ALJ Exh. 6-A). Employer and Carrier timely submitted a Reply Brief, dated July 5, 1974. Employer and Carrier by letter dated July 30, 1974, responded to Claimant's counsel's letter of July 11, 1974 (hereby incorporated in the record as ALJ Exh. 7) with regard to attorney's fee and medical expenses. By letter dated February 3, 1975, counsel for Employer-Carrier submitted a copy of a brief filed in BRB No. 74-191-191A, *Diverson Ford v. P.C. Pfeiffer Company, Inc., et al.*, which is hereby rejected as not timely filed.

On the basis of the stipulations of the parties and the briefs and memoranda filed herein, I make the following findings, conclusions and order.

Findings of Fact

The facts are fully set forth in the Stipulations of the parties and the pertinent facts are summarized as follows:

1. Employer, Ayers Steamship Co., is a ship agency and a terminal operator and does not employ longshoremen to load or unload vessels (Stip. 1, pp. 3, 4). As a ship agency, Employer has employees who board oceangoing vessels and perform some duties on the navigable waters of the United States (Stip. 1, p. 4). As a terminal operator, Employer receives cargo for eventual loading aboard a vessel and stores it in a pierside warehouse until space aboard a vessel is ready to receive it and until longshore labor is available to load the cargo (Stip. 1, p. 4).

2. To perform its terminal operations in Galveston, Employer employs cotton headers and quaymen from Local 1308 (Stip. 1, p. 4). Local 1308 is the ILA cotton headers local (Stip. 3, p. 3). Cotton headers are employed solely to unload cotton bales from shoreside transportation and to store it in pierside warehouses. Cotton headers never move the bales from the pile (warehouse) to the ship (Stip. 1, p. 2). Quaymen perform cargo shifting operations from one storage location to another storage location within the pierside warehouses, but they do not perform longshore work. Cotton headers and quaymen do not deliver cargo to vessels and never work on vessels or on the navigable waters of the United States (Stip. 1, pp. 4-5).

3. Claimant, for five or six years prior to May 2, 1973, had worked exclusively as a cotton header or quayman out of Local 1308; Claimant has done no longshoring work; and Claimant's work has on no occasion required him to go aboard a vessel on the navigable waters of the United States (Stip. 1, pp. 1, 3).

4. On May 2, 1973, Claimant, while employed by Employer as a cotton header at a warehouse immediately

adjacent to Pier 23, Port of Galveston, Texas, sustained a fracture of the 5th Metacarpal bone in his right hand and other injuries to his right hand when, as he was unloading a bale of cotton, a "spider" from the banding on the bale caught his glove and pulled him along with the rolling bale so that his right hand was caught between two bales (Stip. 1, pp. 1, 2).

5. The driver of the dray wagon, an employee of Bluebonnet Warehouse, who had brought the dray wagon to the warehouse, was assisting Claimant unload the bales when Claimant was injured (Stip. 1, p. 2).

6. In the Port of Galveston, cotton is received by various shoreside cotton compress/warehouses from inland shippers. The cotton is then drayed to pier warehouses, the driver of the dray, together with two cotton headers take the cotton off the dray wagon and move it to the designated place in the pier warehouse (Stip. 1, p. 1). The cotton remains stored in the warehouse until it is moved by longshoremen, not cotton headers, to shipside. After the cotton headers take the cotton off the dray wagons and put in to rest in the warehouse, they do not load it again (Stip. 1, p. 2), unless the cotton is removed from that warehouse and stored in another warehouse (Stip. 1, p. 4), in which event, although cotton headers do not move cotton from one warehouse to another, they may be employed as cotton headers, to receive cotton into the other warehouse from dray wagons which have come from another pierside warehouse. Cotton headers do not work at any location other than pierside warehouses (Stip. 3, pp. 4-5).

7. The cotton on which Claimant was working when injured was stored in anticipation of the arrival of the

SS KOREAN EXPORTER which was not in port at the time and did not arrive at the dock until May 7, 1973. The cotton which Claimant was actually heading at the time of his injury on May 2, 1973, was, in fact, loaded aboard the KOREAN EXPORTER by longshoremen on May 7, 1973. The loading of the KOREAN EXPORTER was accomplished by longshoremen employed by Young & Company, an independent contracting stevedoring company in no way affiliated with Employer. Young & Company was employed by the vessel's operator (Stip. 1, pp. 3-4).

8. The Deepsea and Cotton Agreement Rule 20, which defines longshore work, provides, in part, as follows:

> "Longshore work shall constitute the loading and discharging of all sea-going vessels . . . and all labor connected with the loading and discharging of ships . . . Longshore labor also includes all men who truck cargo direct to and from pile or car or to and from the ship's side to hatches. The important distinction being whether or not the freight is handled once, that is to say, laid down or piled. It is mutually agreed that when assorting is necessary when discharging the employment of warehouse labor is optional. . . ." (Stip. 3, pp. 3-4)

9. The Cotton Headers Union Contract provides:

> "It is recognized and agreed that breaking down cotton stacked for loading aboard ship is longshore work." (Stip. 1, p. 2).

10. It is possible that cotton can be transferred directly from dray wagon to ship, in which event the work would be done by longshoremen; however, if this is done,

cotton headers who otherwise would have stored the cotton in the warehouse must be paid for each bale so handled by the longshoremen (Stip. 3, p. 2).

11. Cotton stored in the warehouse by cotton headers is segregated by lot (Stip. 3, p. 2); may remain in storage for periods ranging from less than a day to several weeks; each warehouse allows a certain number of days of "free time" after which storage charges accrue. At the warehouse in which Claimant's injury occurred, "free time" for cotton was 15 days (Stip. 3, p. 3).

12. Claimant's average weekly wage was $166.69. Following the injury in question, Claimant was temporarily totally disabled from May 4, 1973, to June 29, 1973, a period of eight weeks, for which compensation under the Act would be $889.04; that, in addition, Claimant has suffered a permanent partial disability to his right hand from June 30, 1973, for which he would be due compensation under the Act for a further period of 24.4 weeks in the total sum of $2,711.57; and that the total amount of compensation owed if jurisdiction is determined to exist under the Act is $3,600.61 (Stip. 2, p. 2), not including, however, $158.00 of medical expenses claimed by Claimant's attorney (AJJ Exh. 6-A) to which Employer-Carrier have noted an objection (ALJ Exh. 7).

13. Carrier has paid Claimant compensation for temporary total disability for eight weeks at the maximum weekly rate under the Workmen's Compensation Act of Texas that if jurisdiction is found to exist under the Act, Employer-Carrier are entitled to a credit of the amount of State compensation paid; that whatever additional compensation, if any, Claimant may be entitled under the State compensation act if jurisdiction is found not to exist

under the Act will be determined after final decision in this case (Stip. 2, p. 2).

14. Timely notice of injury was given; claim for compensation under the Act was timely filed; and Employer-Carrier have furnished such medical care and attention as the nature of injury required (Stip. 2, p. 1).

Conclusions

Claimant performed no work on navigable waters and was injured in a warehouse on the land. Clearly, prior to the 1972 amendments of the Act he would not have been covered by the Act. *Nacirema Operating Co., Inc. v. Johnson,* 396 U.S. 212 (1969).

Employer has employees who are employed in maritime employment upon the navigable waters of the United States and is, therefore, an "employer" within the meaning of Section 2(4) of the Act; but a claim is no longer covered by the Act merely because the employer has other employees employed in maritime employment and the injury occurred upon "navigable waters". Coverage under the Act now requires that the employee, himself, be a person engaged in maritime employment, as very succinctly and very correctly stated by the Solicitor in his brief as follows:

> "An injured claimant now must meet that definition, [of employee §2(3)] or his injury will not fall within the terms of §3(a); he may no longer rely on the fact that *other* persons working for his employer are doing maritime work.
>
> "In the absence of this new 'status' requirement, the Act would have reached injuries on land to persons whose employment involved no maritime function;

such injuries, however, are not maritime subjects at all. The purpose of the limitation of coverage to persons 'engaged in maritime employment' was thus to restrict the Act's application to subjects within the Federal admiralty powers." (Memorandum of Director, p. 4).[3]

Claimant was not a longshoreman; he did not load vessels. He was a cotton header, or warehouseman; his duties as a cotton header consisted solely of unloading bales of cotton from dray wagons and storing the bales of cotton in segregated lots in the warehouse or, possibly, on rare occasions moving bales of cotton from one location to another within the same warehouse. On other occasions, Claimant worked as a quayman in moving cotton bales from one warehouse to another warehouse. Claimant was injured at a warehouse "immediately ad-

3. Liability prior to the amendment of Section 2(3) of the Act, in cases such as *Peter v. Arrien*, 325 F. Supp. 1361 (E.D. Pa.), *aff'd*, 463 F.2d 252 (3rd Cir. 1972), was predicated on the definition of "employer" in §2(4) as ". . . an employer any of whose employers are employed in maritime employment . . . upon the navigable waters . . .", the absence of any definition of "employee"—except certain persons not included "in the term, and the provision of §3(a) which provided,

"Compensation shall be payable . . . in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States . . ."

Coverage was established if the disability or death occurred on navigable waters even if the decedent or disablee was not engaged in maritime employment, if the employer had some employees employed in maritime employment. *Gilmore v. Weyerhaeuser Company*, BRB No. 74-141. However, Section 2(3) of the Act, as amended, now defines the term "employee" as,

". . . any person engaged in maritime employment . . ."

Consequently, this term "employee" in §3(a) of the Act now means a person engaged in maritime employment, i.e., even if disability or death occurs on navigable waters, such disability or death would be covered under §3(a) only if that employee were engaged in maritime employment.

jacent",[4] but not adjoining, Pier 23, Port of Galveston, Texas.

The warehouses at which cotton headers work are also described as "pierside" and the cotton bales are brought to such pierside warehouses with the express intention that the cotton will be shipped in maritime commerce aboard sea-going vessels. Nevertheless, Claimant's duty as a cotton header was to store the cotton bales in the warehouse. The cotton bales come to rest in the warehouse. The movement from the warehouse, or "pile" to dockside is performed by longshoremen. The Union agreements draw a hard, but clear, line of demarcation between warehouse, or cotton header, work on the one hand and longshore work on the other. Longshore work begins at the warehouse, or "pile" to dockside and loading aboard a vessel; warehouse, or cotton header, work extends to the storage of the cotton bales in the warehouse, or "pile", shifting of cotton bales within a warehouse. Rule 20 of the Deepsea and Cotton Agreement, which defines longshore work, expresses it as follows:

". . . Longshore labor also includes all men who truck cargo direct to and from pile . . . The important distinction being whether or not the freight is handled once, that is to say, laid down or piled . . ."

4. The dictionary definition of "adjacent" is

"Lying near, close, or contiguous; neighboring; bordering on; as a field adjacent to the highway." Webster's New International Dictionary, 2nd Ed. (1958)

or

"Lying near or close to; sometimes, contiguous; neighboring . . . Adjacent implies that the two objects are not widely separated, though they may not actually touch . . . while adjoining imparts that they are so joined or united to each other that no third object intervenes." Black's Law Dictionary, Revised 4th Ed. (1968)

The Cotton Headers Union Contract provides that,

> ". . . breaking down cotton stacked for loading aboard ship is longshore work."

Under the Galveston Union contract, cotton bales must be handled twice, that is, must be laid down or piled before moving to the ship's side or cotton headers, who otherwise would have laid down, or piled, the cotton must be paid for each baie so handled by the longshoreman.

Section 2(3) of the Act, as amended, defines employee as follows:

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . ."

Section 3(a) of the Act, as amended, specifies the coverage of the Act as follows:

> "Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . ."

Claimant was not a longshoreman and he was not engaged in longshoring operations; he was not injured upon the navigable waters nor on any adjoining pier,

wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel. Was he, nevertheless, as contended by the Solicitor, engaged in maritime employment?

Neither S. 2318 [July 20 (legislative day, July 19, 1971)] nor S. 525, [February 2, (legislative day, January 26, 1971)] on which the Hearings were held [Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Hearing before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 92nd Cong., 2nd Sess. (1972)] proposed any change in coverage or amendment of Sections 2(3) or 3(a) of the Act so that scant attention was given in the Hearing to any question of coverage or jurisdiction. The following comments relating to the matter have been noted:

> "Senator Javits. . . .
>
> "Lastly, Mr. Secretary, I understand that there is also some controversy about work over land and work over water, and there has been quite a good deal of litigation. Would you have any suggestion as to how we could deal with that subject?
>
> "Secretary Hodgson. I had thought that through years of court cases on this that that thing had been somewhat narrowed, that questions under that had been somewhat narrowed.
>
> "I don't know how we could improve that differentiation, but I would be willing to examine whether or not we could.
>
> "I would like to see if Mr. Schubert has any comments on that.

"Mr. Schubert. Well, the latest case to draw a line was the Nascirema case, and it drew the line between the ship and the plank and the land on which the dock was located. It seems to me that it is inevitable that a line be drawn somewhere. It is just a matter of judgment as to the most appropriate geographical place.

"I think that we certainly could work with staff in coming up with a more rational and reasonable line. I am always apprehensive that we open the door to more litigation, but we certainly would be delighted to look at it, as we have been in the preparation for these hearings.

"Senator Javits. Thank you very much. I think that the willingness of the Department to examine these questions with an open mind is very gratifying, and I am hopeful that we can have a collaboration that will be constructive." (Hearings, pp. 38-39)

"Mr. Mittelman. One other question, and that concerns the reach of a Longshore Act as proposed, its relationship to the State act. Concerning the water's edge, how does that apply to a ship repair yard? I think I understand pretty well how it applies to custmoary longshore situations. I am not quite clear how a shipyard is set up.

"Mr. Hartman. Same thing.

"Mr. Mittelman. Is most of the work actually performed over navigable waters, or is a lot of it performed on dry land?

"Mr. Hartman. In an average ship repair yard, I don't know, I guess it would be 60 or 65 percent, depending on whether it is a conversion, or if it is a repair of a damage at sea, but, on the average, I would say 65 or 70 percent of the work in a standard repair yard is performed aboard the vessel, afloat in navigable waters or in drydock.

"Mr. Mittelman. Would you see any virtue, or it is in fact feasible to have the same rule apply as far as compensation goes? In other words, to extend the Longshore Act to all ship repair work performed over the water or contiguous to it, in proximity to it, so that you do not get this duality of benefits, I mean, particularly as we amend this law as you propose, it is going to be much better than of the State laws, so there will be quite a difference in benefits, depending on which side of that water's edge the ship repairman in your case is entered.

"Mr. Hartman. I am not authorized tc speak for the shipbuilding industry. I can respond personally to that question, and for my own company, and tell you that we would see no objection, we would interpose no objection, to extending the Longshoremen's Act to the land-based facility of the ship repair yard.

"Mr. Mittelman. That is very helpful to know that. Thank you." (Hearings, pp. 76-177)

Mr. Davis B. Kaplan, Chairman of Admiralty Section, American Trial Lawyers Association, excerpt from prepared statement, entitled "An Analysis of Senate Bill 525."

> "The maritime worker, whether he be crewmember or longshoreman, is obligated to perform his employment on a ship which he has no familiarity with, nor control over and with equipment generally supplied by the ship . . . (Hearings, p. 363)
>
> * * * * *
>
> "It is also of some importance, it seems to us, that most shoreside workers can and do exercise some control over the area in which and the tools with which they work. This is not true of longshoremen. They must work, if they are to work at all, in and on areas supplied by a total stranger over whom they exercise no control. They must accept the area

and tools of work as they find them or refuse to work. Because of the hazardous nature of the work, the rights and obligations of the people involved have been molded by the legislature and by our courts in order to harmonize the divergent interests. On the one hand the marine worker must perform his work under severe circumstances so the correlative duty of the shipowner is to provide a reasonably safe place for the worker to perform his activity." (Hearings, p. 368).

In an amendment reported by Senator Eagleton on September 13, 1972, the original provisions of S. 2318 were stricken and extensively revised provisions were substituted. S. 2318, as amended was accompanied by S. Rep. 92-1125, 92nd Cong., 2nd Sess. (Sept. 14, 1973). See, Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 92nd Cong., 2nd Sess., December, 1972 (References to the Legislative History, "Leg. History" will be identified as to source followed by the page of the Legislative History volume and, where applicable, the page of the Report).

S. Rep. 92-1125 with respect to the extension of coverage stated, in part, as follows:

"The bill also expands the coverage of this Act to cover injuries occurring in the contiguous dock area related to longshore and ship repair work." (Rep. p. 2, Leg. History p. 64).

* * * * *

"Extension of Coverage to Shoreside Areas

"The present Act, insofar as longshoremen and shipbuilders and repairmen are concerned, covers

only injuries which occur 'upon the navigable waters of the United States.' Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs." (Rep. p. 12, Leg. Hist. p. 74)

* * * * *

"It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

"The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

"The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel just because they are injured in an area adjoining navigable waters used for such activity. Thus employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending the coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part, in some form of maritime employment. Thus, an individual employed by a person none of whose employees work in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters." (Rep. p. 13, Leg. Hist. p. 75)

H. R. 12006, initially introduced by Congressman Daniels on December 2, 1971, was amended September 25, 1972, by striking out all of the original proposals and substituting provisions identical to those contained in S. 2318, as

amended, and H. R. 12006, as amended, was accompanied by H. R. Rep. 92-1441 which, as pertains to the extension of coverage, is substantially identical to S. Rep. 92-1125 (See, for example, Rep. pp. 10-11, Leg. Hist. pp. 216-217).

"We do not believe that the compensation payable to a longshoreman or harbor worker should depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, section 2 of our bill amends the act to provide coverage of longshoremen, harbor workers, ship repairmen, shipbuilders, shipbreakers, and other employees engaged in maritime employment—excluding masters and members of the crew of a vessel—if the injury occurred either upon the navigable waters of the United States or any adjoining pier wharf, drydock, terminal, buildingway, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading; unloading; repairing; or building a vessel." (Statement, Cong. Daniels, Leg. Hist. p. 287)

QUESTIONS AND ANSWERS

"Question. The present law covers employees working on navigable waters. Do the amendments change the scope of coverage?

"Answer. Yes. The present law's coverage is limited to employees working on navigable waters, including those working on dry docks. The amendments will extend coverage to wharfs, terminals, marine railways and other adjoining areas customarily used in building, repairing, loading, or unloading vessels. Also, the definition of "employee" is clarified by the amendments.

"The latter change was made so that a determination of coverage can be made on the basis of the

definition of "employee." Under the present law that definition is so vague that the determination must be made on the basis of whether the injured individual was working for a covered "employer." The expansion of coverage is intended to bring about a measure of compensation uniformity applicable to persons customarily considered to be working in the business. Thus, even if an employee does not happen to be over navigable waters at the time he is injured, he will be covered as long as he is working as a longshoreman or harborworker, whether engaged in repairing a vessel or unloading it."

(Submitted during floor debate by Cong. Steiger, Leg. Hist. p. 298).

[From the Congressional Record—
Senate, Oct. 18, 1972]

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972

Mr. Eagleton. . . .

"Significant improvements in the act are also made in the area of extended coverage, by extending coverage to injuries occurring in the contiguous dock area related to longshore and ship repair work. . . ." (Leg. Hist. p. 383).

Reasonable minds may differ as to intent of Congress as evidenced by the Legislative History provided for, like the Bible, it can be read to support quite divergent views. Bearing in mind the admonition of a former professor that "the Bible has suffered from inattention to what is said and the manner in which it is expressed", which admonition is equally applicable to conclusions as to presumed Congressional intent, it must be noted: a) in the course of the Senate Hearings, Senator Javits raised the

question of work over land and work over water to which Secretary of Labor Hodgson and Solicitor of Labor Schubert responded. Mr. Schubert stated that the latest case to draw the jurisdictional line was the *Nacirema* case. He further stated, "It seems to me that it is inevitable that a line be drawn somewhere. It is just a matter of judgment as to the most appropriate geographic place."; b) Minority counsel Mittleman raised the question of extension of the Act to all ship repair work, to which Mr. Ralph Hartman responded that his own company ". . . would interpose no objection to extending the Longshoremen's Act to the land-based facility of the ship repair yard."; C) "maritime worker" was discussed as "crewmember or longshoreman" and special significance was placed on fact that ". . . most shoreside workers can and do exercise some control over the area in which and the tools with which they work. This is not true of longshoremen."; d) Senate Report 92-1125 states at the outset that "The bill also expands coverage of this Act to cover injuries occurring in the contiguous dock area *related to longshore* and ship repair *work*." (Emphasis supplied); and Senator Eagleton, who reported the amendment to S.2318, repeated the same statement in his statement on October 18, 1972; f) Senate Report 92-1125 and House Report 92-1441, make it clear that the primary concern, vis-a-vis loading and unloading, was that the longshoremen be covered whether the work be over water or on the land and stated, "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by the Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining

navigable waters. *The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.*" (Emphasis supplied); and g) Congressman Steiger, in his Questions and Answers, stated, "The expansion of coverage is intended to bring about a measure of compensation uniformity applicable to persons customarily considered to be working in the business. *Thus, even if an employee does not happen to be over navigable waters at the time he is injured, he will be covered as long as he is working as a longshoreman or harbor worker, whether engaged in repairing a vessel or unloading it.*" (Emphasis supplied)

Coverage under the Act has never been, and is not now, governed by engagement in maritime commerce. From the foregoing, I conclude that Congress extended coverage only to the point on such pier, wharf, or terminal adjoining navigable waters, that the longshoring operation, i.e., the loading of a vessel, begins and that the extension of coverage ceases when the longshoring operation ceases with placement of the cargo on such pier, wharf, or terminal adjoining navigable waters. No other conclusion is consistent with the language of §2(3) of the Act "longshoreman or other person engaged in longshoring operations" and the expressed Congressional intent that the extended coverage apply to. "The employees who perform this [longshoring] work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area" *but specifically would not cover* "employees who are not engaged in loading, unloading, or repairing a vessel, just because they are injured in an area adjoining navigable waters used for such activity."

Claimant was not a longshoreman; he did not perform longshoring operations; and the bales came to rest in the pile, or warehouse, before the longshoring operation began. That cotton headers are not persons customarily considered to be working in the longshoring business is firmly established, not only by custom and practice in the industry in the Port of Galveston, but also by the agreement of the Cotton Header Union, under which Claimant worked, as well as by Rule 20 of the Deepsea and Cotton Agreement. It is true, of course, that placement of the cotton bales in the pile was the last step before commencement of the loading, or longshoring, operation; that the cotton was brought to pierside warehouses in expectation that it would be loaded aboard sea-going vessels; and, indeed, that longshoremen take the bales, stored by cotton headers, from the pile to dockside and load the bales in the vessels. Nevertheless, Claimant's work does not involve loading a vessel and is not a longshoring operation and, as pertains to this case, Claimant is not, therefore, engaged in maritime employment within the meaning of Section 2(3) of the Act.[5] Stated otherwise, the movement of cargo does not become a maritime employment within the contemplation of Section 2(3) of

5. Obviously, the extension of coverage brings within the protection of the Act persons engaged in maritime employment who are harbor workers, even though they are not longshoremen, nor ship repairmen, nor shipbuilders, nor shipbreakers. For example, a line tender, whose duties consist of the docking and undocking sea-going vessels, is engaged in maritime employment even if his duties are performed on the dock.

the Act until the longshoring operation begins. In this case, Claimant's work ceased and the cargo came to rest in the warehouse before the longshoring operation began. Accordingly, Claimant is not subject to the coverage of the Act.

This conclusion is consistent with the decisions of the Benefits Review Board construing the Act, or at least, is not irreconcilable with the decisions of the Benefits Review Board construing the Act. *William T. Adkins v. I.T.O. Corporation of Baltimore, BRB* No. 74-123 (1974), involved an injury while loading stripped cargo into trucks for further movement. Although the Board affirmed the finding of the administrative law judge that the injury occurred while the cargo was still in maritime commerce, which, with all deference, is not a proper criteria of coverage within the meaning of the Act; nevertheless, the Board held that, "The Claimant was performing the first and last in a series of longshoring operations thereby bringing him within the scope of maritime employment." Here, the longshoring operation began after Claimant stored the cotton in the warehouse.

Dominick Coppolino v. International Terminal Operating Company, Inc., BRB No. 74-136 (1974), involved a foreman of longshoring and hiring agent who was injured while replacing paper in an IBM machine located in a building on the pier. The Board held that, "The fact that at the time of injury he was engaged in a clerical function necessary to the performance of his job does not remove him from the sphere of longshoring operation, nor from coverage under the Act." *Herbert L. Perdue v. Jacksonville Shipyards, Inc.*, BRB No. 74-200 (1975), involved injury to a shipfitter which occurred when he disembarked from a company bus in order to "punch out".

The point of injury was about one mile by land from the ship on which he was working but still within the naval station. The Board held that the "claimant is entitled to coverage under the Act." Both in *Coppolino* and *Perdue* the Board was confronted with injuries to persons clearly covered by the Act in their regular employment, where the injury occurred in the course of employment but at a time when they were not engaged in their regular covered employment. Here, of course, Claimant was not a longshoreman and was not engaged in a longshoring operation so that the "course of employment" rationale is not applicable.

Giacomo Avvento v. Hellenic Lines, Ltd., BRB No. 74-153 (1974), involved an injury while loading cargo onto a truck parked on the pier. The Board held, "This was a final step in the unloading process . . ." As noted above, the loading, or longshoring, operation in this case began after the completion of Claimant's work.

Donald D. Brown v. Maritime Terminals, Inc., 74-177 and 74-177A (1974), involved an injury while "stuffing" cargo into a shipping container in a warehouse. The Board held that, ". . . the claimant was injured while within the scope of coverage as enlarged by the 1972 amendments to the Act . . ." There, in accordance with union jurisdictional claims and industry practice, the longshoring operation began with the stuffing of containers. Here, of course, in accordance with union agreements, jurisdictional claims and industry practice the longshoreing operation began with removal of the cotton bales from the pile, i.e., Claimant's work ceased before the longshoring operation began.

In view of the language carefully chosen by Congress, Claimant was not injured on an adjoining pier, wharf or terminal, but see, *William T. Adkins v. I.T.O. Corporation of Baltimore, supra;* however, even if he were, Congress stated that the Act was not intended to cover "employees who are not engaged in loading, unloading, or repairing a vessel, just because they are injured in an area adjoining navigable waters used for such activity." Claimant was not, in any event, engaged in loading, unloading, or repairing a vessel.

Finally, the Solicitor states that

> ". . . employees who only deliver cargo to . . .[6] 'storage' facilities—like the driver of the cotton dray, an employee not of Ayers but of Bluebonnet Warehouse, who assisted Bryant [Claimant] and another cotton header in unloading the cotton from the dray wagons . . . are not covered by the Act." (Memorandum of Director, p. 7).

Claimant, as well as the driver of the cotton dray, merely delivered cargo to storage facilities. Although this brought the cargo to a "pierside" point, Claimant's work was a warehousing function and the longshoring operation began after completion of the warehousing operation. Indeed, until the longshoring operation began the cotton was subject to movement to other warehouses. The line of demarcation between warehousing on the one hand and longshoring on the other was clearly and emphatically set forth in the Union agreements. The example given in Senate Report 92-1125 and in House Report 92-1441 that the extension of coverage goes to the point that the

6. The phrase, "on-pier" is clearly in error and has been omitted.

cargo comes to rest on the pier, wharf or terminal adjoining navigable waters necessarily means that the extension of coverage in unloading cargo ends at that point; and conversely, the extension of coverage in loading begins when the longshoring operation begins. As noted above, it is fully recognized that the Benefits Review Board, consistent with industry practice, has held that the Act extends to "stuffing" or "unstuffing" of containers because that is the point that the longshoring operation begins or ends. But here, the industry practice and the applicable union contracts quite specifically provide that the longshoring operation begins with the removal of the cotton bales from the pile, or warehouse, and the longshoring operation ends with the placement of the cotton bales in the pile, or warehouse. Claimant was not engaged in loading a vessel and, hence, was not engaged in maritime employment at the time of injury. *Kenneth E. Powell v. Cargill, Inc.*, 74-LHCA-172 (1974); *John A. Richardson v. Great Lake Storage & Contracting Co.*, 74-LHCA-223 (1974). The presumption of Section 20 is self limiting, i.e., "in the absence of substantial evidence to the contrary"; has no quality of affirmative evidence, *John W. McGrath Corporation v. Hughes*, 264 F.2d 314, 317 (2nd Cir. 1959); "Its only office is to control the result where there is an entire lack of competent evidence." *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935); and as to jurisdiction does not become effective until jurisdiction is first affirmatively established and only then does the coverage presumption become effective. *Atlantic Stevedoring Company, Inc. v. O'Keeffe*, 220 F.Supp. 881 (S.D. Ga. 1963) *rev'd on other grounds*, 354 F.2d 48 (5th Cir. 1965); *Employers Mutual Liability Insurance Company of Wisconsin v. Arrien*, 244 F.Supp. 110 (N.D.

N.Y. 1965). Employer-Carrier have come forward with substantial stipulated evidence and even a liberal construction may not be employed to frustrate the Congressional intent as evidenced by the new definition of "employee", the Committee Reports and the related legislative history. *Diverson Ford v. P. C. Pfeiffer Company*, 74-LHCA-181 (1974).

The exclusion of the driver of the dray wagon from coverage, as conceded by the Solicitor, in the event of injury while working with the cotton headers in unloading bales from the dray wagons and storing the bales in the warehouse would perpetuate the disparity in benefits payable to employees performing the same job; but, if Claimant were otherwise covered by the Act, the non-coverage of a fellow employee could not deprive an employee otherwise covered of the benefits of the Act. Cf., driver of truck in *Giacomo Avvento v. Hellenic Lines, Ltd.*, BRB No. 74-153 (1974).

For the foregoing reasons, Claimant was not an employee within the meaning of Section 2(3) of the Act and compensation for his injury is not within the coverage of Section 3(a) of the Act. Accordingly, Employer and Carrier's Motion to Dismiss for lack of jurisdiction will be granted and Claimant's claim will be denied as not within the coverage of the Act. In view of the denial of the claim for compensation, the further claim of Claimant's attorney for the allowance of an attorney's fee, medical expenses and costs must also be denied. *Director Office of Workmen's Compensation Programs v. Hemingway Transport, Inc.*, BRB No. 74-129 (1974); *John Karacostas, Sr. v. Port Stevedoring Company, Inc.*, BRB No. 74-176 (1974); *Leo F. Baum v. Jacksonville*

Shipyards, Inc., 74-LHCA-88, *aff'd* BRB No. 74-110 (1974).

ORDER

The claim of Claimant, Will Bryant, be, and the same is hereby, dismissed for lack of jurisdiction.

The claim of Claimant's attorney for allowance of an attorney's fee, medical expenses and costs be, and the same are hereby, dismissed for lack of jurisdiction.

/s/ WILLIAM B. DEVANEY
William B. Devaney
Administrative Law Judge

Dated: February 28, 1975
Washington, D.C.

APPENDIX E

U.S. DEPARTMENT OF LABOR
Benefits Review Board
WASHINGTON, D. C. 20210

BRB NOS. 75-137 and 75-137A

WILL BRYANT, Claimant-Petitioner

v.

AYERS STEAMSHIP COMPANY

and

TEXAS' EMPLOYERS' INSURANCE ASSOCIATION
Employer/Carrier-Respondents

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Petitioner

Appeal from Decision and Order of William B. Devaney, Administrative Law Judge, United States Department of Labor.

Arthur L. Schechter (Downman, Jones & Schechter), Houston, Texas, for the claimant.
E. D. Vickery, W. Robins Brice (Royston, Rayzor, Cook & Vickery), Houston, Texas for the employer/carrier.

Joshua T. Gillelan, II (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D. C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Miller, Member:

These appeals by the claimant and by the Director, Office of Workers' Compensation Programs (hereafter, the Director), are from a Decision and Order (74-LHCA-89) of Administrative Law Judge William B. Devaney, in which he found lack of jurisdiction over this claim for compensation, filed pursuant to provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereafter referred to as the Act).

All pertinent facts, including degree of disability and amount of compensation due if the claimant were found to be subject to the Act, were stipulated by the parties. All parties waived formal hearing and oral argument and agreed that the case be submitted for decision on the agreed stipulations of fact. The administrative law judge found the sole issue for determination to be "jurisdiction", specifically, whether or not a cotton header, injured while unloading cotton bales from a dray inside a pier-side warehouse, is subject to the provisions of the Act. The administrative law judge determined that the "claimant was not an 'employee' within the meaning of Section 2(3) of the Act and compensation for his injury is not within the coverage of Section 3(a) of the Act". 33 U.S.C. §§902 (3), 903(a). Therefore, he dismissed the claim for lack of jurisdiction. From this denial of compensation, both the claimant and the Director appeal.

The employer is a ship agency and terminal operator. As a terminal operator, it receives cargo for temporary

storage in a pier-side warehouse. Cotton bales are held in such a warehouse for periods averaging one week, then moved out and placed on board a vessel. The company does not provide stevedoring services to ships, but rather contracts with other companies to move cargo to or from the warehouse and ships.

The claimant was employed as a cotton header. His duties were to assist another cotton header and the driver of a dray in unloading bales of cotton from the dray and placing them in a warehouse located immediately adjacent to Pier 23 at Galveston, Texas. The claimant's duties never required him to assist in moving cargo from a warehouse to a ship or to work on board a vessel, but on occasion he did participate in movement of cargo from one warehouse to another. On May 2, 1973, the claimant injured his right hand while unloading bales of cotton from a dray.

The jurisdictional requirements of the Act are embodied in Sections 2(3), 2(4) and 3(a). 33 U.S.C. §§ 902(3), 902(4) and 903(a). There is no dispute that the employer is an "employer" as defined in Section 2(4). The parties stipulated that the claimant's accident occurred in a warehouse immediately adjacent to a pier which adjoins navigable waters. This is an apparent concession that the injury was sustained in a geographic area within the "situs" jurisdiction of Section 3(a). However, in his Decision and Order, the administrative law judge found that the injury in this case did not come within Section 3(a) coverage.

Although the parties apparently stipulated that the claimant sustained his injury within the geographic reach of the Act, such a stipulation is not binding on the fact-

finder. *California Ship Service Co. v. Pillsbury*, 175 F.2d 873 (9th Cir. 1949). While the parties did not address Section 3(a) in their written submissions to the administrative law judge, he nevertheless rejected the apparent concession that the "situs" requirement of jurisdiction was met and found that this claim is not within the coverage of Section 3(a) of the Act. This conclusion is erroneous.

There is little evidence in the record of the geographic relationship between the site of the warehouse where the claimant was injured and navigable waters. Nevertheless, it is clear from the record that the employer is a terminal operator; that the claimant's accident occurred in a warehouse immediately adjacent to Pier 23; that the pier adjoins navigable waters of the United States; that this pierside warehouse is used for the temporary storage of cotton prior to loading a ship; and that usually cotton is taken directly from that warehouse to a ship and loaded aboard. Given these facts, stipulated by the parties, and found by the administrative law judge, his conclusion that the claimant was "not injured upon the navigable waters nor on any adjoining pier, wharf, dry dock, *terminal*, building way, marine railway or *other adjoining area customarily used by an employer in loading* unloading, repairing, or building *a vessel*" (emphasis added) is clearly erroneous as a matter of law. The clear language of Section 3(a) includes the pierside warehouse where this claimant was injured.

The issue most strenuously pursued before the administrative law judge and again here on appeal, concerns whether or not the claimant is an "employee" as defined in Section 2(3). The administrative law judge determined that the claimant was not engaged in maritime employ-

ment, that he was not engaged in longshoring operations, and so was not a Section 2(3) employee. This conclusion is erroneous as a matter of law.

Section 2(3) does not require that a claimant be engaged in moving cargo to a ship for immediate placement aboard, or in removing cargo from a ship, in order to qualify as an "employee"; he need only be engaged in longshoring operations, which include all essential steps in the overall process of loading cargo; his duties need only constitute an integral part of the continuous longshoring operation to support a conclusion that he was engaged in maritime employment. *Scalmato v. Northeast Marine Terminal Co.*, 1 BRBS 461, BRB No. 74-203 (May 7, 1975).

Contrary to the position of the administrative law judge, this Board does not subscribe to a "point of rest" theory, in which cargo is maritime in nature and those who handle it are engaged in maritime employment, only when that cargo is being moved from a dock to a ship. *See Ford v. P.C. Pfeiffer Co., Inc.*, 1 BRBS 367, BRB Nos. 74-191, 191A (Mar. 21, 1975). The legislative history of the Act clearly indicates that all cargo handling operations performed on land within the confines of a terminal are to be covered.

> . . . It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.
>
> The Committee believes that the compensation payable to a longshoreman . . . should not depend on the fortuitous circumstance of whether the injury occurred on land or over water.

H.R. Rep. No. 92-1441, 92nd Cong., 2d Sess. 10 (1972).

The Board finds that the claimant's job in this case, unloading cotton bales from a truck in a pierside warehouse, was the first step in a longshoring operation which would eventually conclude at some future date with placement of the cotton in the hold of a ship. *See Powell v. Cargill, Inc.*, 1 BRBS 503, BRB Nos. 74-206, 206A (May 30, 1975). The administrative law judge misinterpreted Section 2(3) of the Act in determining that the claimant was not an "employee" as defined in that section.

This case is hereby remanded to the administrative law judge for entry of a compensation order in favor of the claimant, consistent with this opinion.

/s/ JULIUS MILLER
Julius Miller, Member

We Concur:

/s/ RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

/s/ RALPH M. HARTMAN
Ralph M. Hartman, Member

Dated this 13th day
of November, 1975

SERVICE SHEET

BRB Nos. 75-137 & 137A

WILL BRYANT v. AYERS STEAMSHIP COMPANY and TEXAS EMPLOYERS' INSURANCE ASSOCIATION - DIRECTOR, OFFICE OF WORKERS' COMPENSATION PORGRAMS, UNITED STATES DEPARTMENT OF LABOR (74-LHCA-89)

Arthur L. Schechter, Esquire — certified
Downman, Jones & Schechter, Esquires
1200 Houston First Savings Building
711 Fannin
Houston, Texas 77002

E. D. Vickery, Esquire — certified
W. Robins Brice, Esquire
Royston, Rayzor, Cook and Vickery
3701 One Shell Plaza
Houston, Texas 77002

Miss. Laurie M. Streeter
Associate Solicitor
U. S. Department of Labor
Suite N-2716-New DOL
Washington, D. C. 20210

Mr. Lee H. Hollis
Deputy Commissioner
U. S. Department of Labor
U. S. Post Office Building, Suite 212
601 Rosenberg
Galveston, Texas 77550

Joshua T. Gillelan, II — certified
Attorney
Division of Employee Benefits
U. S. Department of Labor
Washington, D. C. 20210

Judge William B. Devaney
Office of Administrative Law Judges
U. S. Department of Labor
Washington, D. C. 20036

Mr. Herbert A. Doyle, Jr.
Director, OWCP
U. S. Department of Labor
Suite S-3524, New Labor Building
Washington, D. C. 20210

APPENDIX F

NO. 75-1051

I.T.O. Corporation of Baltimore, Employer,

and

Liberty Mutual Insurance Company, Carrier,
Petitioners,

v.

Benefits Review Board, U. S. Department of Labor,
Respondent,

William T. Adkins, *Respondent,*

International Longshoreman's Association, *Amicus Curiae*

NO. 75-1075

Maritime Terminals, Inc., and
Aetna Casualty and Surety Co.,
Petitioners,

v.

Secretary of Labor, and Donald D. Brown,
Respondents.

NO. 75-1196

Maritime Terminals, Inc., and
Aetna Casualty and Surety Co.,
Petitioners,

v.

Vernie Lee Harris, and
United States Department of Labor,
Respondents

NO. 75-1088

National Association of Stevedores
and
California Stevedore & Ballast Co.,
Carolina Shipping Company,
The Chesapeake Operating Company,
Cilco Terminal Co., Inc.,
John T. Clark & Son of Boston,
Bernard S. Costello, Inc.,
Dixie Stevedores, Inc.,
Eller & Company, Inc.,
Global Terminal & Container Services, Inc.,
Federal Marine Terminals, Inc.,
Gulf Stevedore Corp.,
Harrington & Company, Inc.,
Howland Hook Marine Terminal Corp.,
Independent Pier Co.,
International Great Lakes Shipping Co.,
International Terminal Operating Co., Inc.,
Lake Charles Stevedores, Inc.,
Lavino Shipping Co.,
Luckenbach Steamship Co., Inc.,
McCabe, Hamilton & Renny Co., Ltd.,
John W. McGrath Corp.,
Maher Terminals, Inc.,
Matson Terminals, Inc.,
Metropolitan Stevedore Co.,
Nacirema Operating Co., Inc.,
New Bedford Stevedoring Corp.,
Northeast Marine Terminal Co., Inc.,
Old Dominion Stevedoring Corp.,
John J. Orr & Son, Inc.,

Palmetto Shipping & Stevedoring Co., Inc.,
Pate Stevedoring Co.,
P. C. Pfeiffer Co., Inc.,
Pittston Stevedoring Corp.,
Port Stevedoring Company, Inc.,
Ryan-Walsh Stevedoring Co., Inc.,
Shippers Stevedoring Co.,
E. Smith & Son, Inc.,
Strachan Shipping Co.,
Transoceanic Terminal Corp.,
Universal Maritime Service Corp.,
Westfall Stevedore Co.,
Wilmington Shipping Co.,
Young and Company of Houston,
its member companies,

Petitioners,

v.

Benefits Review Board, U. S. Dept. of Labor,

Respondent,

William T. Adkins,

Respondent.

On Rehearing In Banc.

Argued May 4, 1976 Decided Aug. 26, 1976

Before HAYNSWORTH, Chief Judge, WINTER, CRAVEN, BUTZNER, RUSSELL and WIDENER, in banc.

David R. Owen (Francis J. Gorman, Semmes, Bowen & Semmes on brief) for Petitioners in 75-1051; John B. King, Jr. (Vandeventer, Black, Meredith & Martin on brief) for Petitioners in 75-1075 and 75-1196; Donald A. Krack (William S. Stifler, III, Paul B. Lang, Niles, Barton & Wilmer, Thomas D. Wilcox, on brief) for Petitioners in 75-1088; Linda L. Carroll, Attorney (William J. Kilberg, Solicitor of Labor, Marshall H. Harris, Associate Solicitor, George M. Lilly, Karen L. Gilbert, Attorneys, United States Department of Labor, on brief) for Respondents in 75-1051, 75-1075, 75-1080 and 75-1196; Amos I. Meyers (Terry Paul Meyers on brief) for Respondents in 75-1051 and 75-1088; Charles S. Montagna for Respondents in 75-1075 and 75-1196; Thomas W. Gleason, Jr. (Herzl S. Eisenstadt, Richard H. Kapp on brief) for International Longshoremen's Association, AFL-CIO as Amicus Curiae.

WINTER, Circuit Judge:

These consolidated appeals present two major questions: (1) the extent of coverage of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (sometimes "LHWCA"), to persons engaged in the necessary steps in the overall process of loading and unloading a vessel but who, prior to the Amendments, could claim benefits for accidental injury or death, sustained in the process, only under state law; and (2) whether, in a petition for review under 33 U.S.C. § 921(c), the Director, Office of Workers' Compensation Programs, Department of Labor, is a proper respondent. The appeals were first heard

and decided by a divided panel of the court. I.T.O. Corp. v. Benefits Review Bd., 529 F.2d 1080 (4 Cir. 1975). Chief Judge Haynsworth and I, comprising the majority, held that during the loading and unloading process the coverage of the Act extended to the first (last) point of rest. As applied to the facts, this holding resulted in the conclusion that none of the three claimants was entitled to benefits. Judge Craven was of a contrary view. He would have held that the three claimants were engaged in maritime employment on navigable waters of the United States, as defined in the Act, and hence they should be entitled to benefits under the Act for their accidental injuries. The panel was unanimous in deciding that the Director was not a proper respondent, although it was recognized that, in a proper case, he might be permitted to become an intervenor.

Because of the importance and novelty of the questions decided, the entire court granted cross-petitions for rehearing and reheard the appeals in banc. At the time the appeals were reargued, the in banc court consisted of six judges.

I.

On the issue of the extent of the Act's coverage, Chief Judge Haynsworth, Judge Russell and I subscribe to the views expressed in the majority panel decision. Judge Widener subscribes to the principle expressed in that opinion, although he defines the exact point between coverage and non-coverage somewhat differently.

In his application of the principle, Judge Widener concludes that the claimant Adkins is not covered by the Act, but that claimants Brown and Harris are covered. He reasons that the test of coverage is whether an otherwise

eligible employee is injured while engaged in loading or unloading a ship; coverage would not extend to activities for transshipment of goods removed from a ship or goods destined for a ship. In Adkins' case, a container was removed from the ship and stored in the marshaling area. From there the container was moved to a shed where it was stripped and the contents were stored. Adkins was injured when he was moving the contents from the storage area onto a waiting delivery truck. The cargo was no longer being unloaded from the ship but was in the process of being loaded into a delivery truck. Adkins, in Judge Widener's view, was thus not covered because he was not participating in the unloading process; he was handling the goods for transshipment. Accordingly, Judge Widener concurs in the judgment of Chief Judge Haynsworth, Judge Russell and me to reverse Adkins' award.

In Brown's case, the cargo was brought from somewhere inland and deposited in a warehouse. Brown, operating a forklift, picked up cargo and stuffed it into a container. While stuffing the container, Brown was injured. When the stuffing would have been completed, a hustler would have carried the container to the marshaling area, and from there the container would have been taken to the pier to be loaded on board. Thus, in Judge Widener's view, Brown was engaged in the overall process of loading the ship. The cargo was not merely being moved to storage for convenience or facility; the cargo was in the process of being loaded on board ship, and Brown was engaged in the loading process. Accordingly, Judge Widener concurs in the judgment of Judge Craven and Judge Butzner to sustain the award made to Brown.

Harris was a hustler who was injured while he was taking a container, stuffed with goods which had been stored

after inland delivery, from the stuffing area to the marshaling area. From the marshaling area, the container would have been taken to the pier where it would have been loaded on board. The goods were being moved solely for loading purposes, not for mere convenience, and, therefore, in Judge Widener's view, Harris, like Brown, was engaged in the overall process of loading the ship. Accordingly, Judge Widener concurs in the judgment of Judge Craven and Judge Butzner to sustain the award made to Harris.

Judge Craven and Judge Butzner subscribe to the views expressed by Judge Craven in his dissenting panel opinion, and for those reasons and the additional reasons expressed by Judge Butzner in his separate opinion attached hereto, they vote to affirm the awards made to Adkins, Brown and Harris.

By the majority votes of Chief Judge Haynsworth, Judge Russell, Judge Widener and me, the award to Adkins (Nos. 75-1051 and 75-1088) is reversed. By an equally divided court, the awards to Brown and Harris (Nos. 75-1075 and 75-1196) are affirmed.

II.

On the issue of whether the director is a proper respondent, an issue raised only in Nos. 75-1051 and 75-1088, Chief Judge Haynsworth, Judge Russell, Judge Widener and I subscribe to the views expressed in the majority panel decision as hereafter amplified. Judge Craven and Judge Butzner subscribe to the views expressed in Judge Butzner's separate opinion attached hereto.

III.

Chief Judge Haynsworth, Judge Russell, Judge Widener and I amplify our conclusion that the Director is not a proper respondent as follows:

Prior to the 1972 Amendments, the Act provided for judicial review by an injunction suit against the deputy commissioner making a compensation award. The pertinent part of 33 U.S.C. § 921(b)(1970), *as amended*, 33 U.S.C. § 921(c)(1976 Supp.), provided:

> If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in . . . the judicial district in which the injury occurred. . . .

One of the 1972 Amendments revised § 921 so that subsection (c), the counterpart of the previous subsection (b), now provides:

> Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of Appeals for the circuit in which the injury occurred, by filing in such court . . . a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted . . . to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings. . . .

Certainly the deputy director was a party to pre-1972 litigation, but neither he nor his counterparts is expressly

designated as a party by the 1972 Amendments. The legislative history is unenlightening as to the reason for this omission. While it is true that old § 921a[1] provided that the United States Attorney would represent the Secretary or the Deputy Commissioner in any court proceedings under old § 921, and that § 921a was continued by the 1972 Amendments although modified to permit the Secretary to appoint his own counsel,[2] the legislative history is again unenlightening. To conclude from the mere existence of new § 921a that the Secretary, or his designee, the Director, is automatically a party to a review proceeding is to beg the question. This section's existence can as well mean only that if otherwise made a party, *e.g.*, by intervention in a review proceeding, the Secretary or Director will be represented by attorneys appointed by him.

Indeed, § 939(c)(1), added by the 1972 Amendments, suggest the latter reading. It provides that "[t]he Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim." It would be a redundancy for the

1. 33 U.S.C. § 921a, *as amended,* 33 U.S.C. § 921a (1976 Supp.):
   In any court proceedings under section 921 of this title or other provisions of this chapter, it shall be the duty of the United States attorney in the judicial district in which the case is pending to appear as attorney or counsel on behalf of the Secretary of Labor or his deputy commissioner when either is a party to the case or interested, and to represent such Secretary or deputy in any court in which such case may be carried on appeal.

2. 33 U.S.C. § 921a (1976 Supp.):
   Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

Secretary to be authorized to provide legal services to a prevailing claimant if the Secretary himself was intended actively to litigate to sustain an award.[3] Thus, unlike the pre-1972 Act and numerous other laws providing for judicial review or orders of administrative agencies,[4] the LHWCA, as amended in 1972, does not

3. We fail to understand how the Director's statutory duty to provide legal assistance to claimants confers upon him a stake in the proceedings independent of that of any claimant, as apparently urged by the dissent. The issue we confront is not whether the Director may appear before us as Adkins' representative, but whether the Director may participate in his own behalf.
   We also note that we find nothing in the statute or its legislative history to indicate that the availability of legal assistance to claimants may be made to turn upon whether the Director agrees or disagrees with the decision which a claimant seeks to appeal, as the dissent appears to suggest, *infra,* slip opinion at 20 ("*If he deems the decision erroneous,* his statutory duty to assist the claimant includes seeking review.").

4. Most other statutes providing for judicial review of agency action are simply not analogous to the LHWCA because under them true adversity exists between the claimant of a *government* benefit and the government agency which seeks to withhold it. Thus, when review of agency action is sought by an unsuccessful applicant for a license before the FCC, *see* 47 U.S.C. § 402, or an unsuccessful applicant for a rate increase before the FPC, *see* 16 U.S.C. § 8251(b), or an unsuccessful claimant for Supplemental Security Income before the Secretary of H.E.W., *see* 42 U.S.C. §§ 405(b), 1383(c)(3), it is clear that the agency must be named a respondent since *it* is the party against whom relief is sought; the court could not grant an effective remedy without its presence. (Conversely, these agencies would never have reason to seek review of their own decisions.) In LHWCA cases, on the other hand, it is the private employer or insurance carrier which will have to pay any award which may be entered.
   The Labor-Management Relations Act is more nearly similar to the LHWCA, since under it, as under the LHWCA, disputes are adjudicated between antagonistic private parties. And the NLRB may be called upon to defend its decisions in court. *See* 29 U.S.C. § 160(f). However, the NLRB's status as a party in the courts of appeals derives from its enforcement powers. *See* id. ("Upon the filing of such petition [for review], the court shall proceed in the same manner as in the case of an application by the Board under sub-

on its face make the Director a respondent to a petition to review under § 921(c).

Since the Act is not specific, it follows that, if the Director is to be a party, he must be a "person adversely affected or aggrieved by a final order of the Board" within the meaning of § 921(c). Whether he is or is not is a question closely akin to the issue of whether the "case or controversy" requirement of Article III of the Constitution has been met.

Generally, to be adversely affected or aggrieved under the statute or to present a case or controversy under the Constitution, one must have suffered "injury in fact, economic or otherwise." *See* K. Davis, Administrative Law (1970 Supp.) § 22.00-1 at 706; 3 *id.* § 22.02. Therefore, to be a party before this court, the Director must have some concrete stake in the outcome of the case.

The Director asserts he has the requisite stake because

> [h]e is directly affected in his official capacity by the correctness of the Board's decision involving the proper scope of coverage of the Act with whose administration he is charged as the designee of the Secretary of Labor.

---

section (e) of this section [granting the Board power to enforce its decisions in court], and shall have the same jurisdiction . . . to make and enter a decree enforcing, modifying . . . or setting aside in whole or in part the order of the Board"). Thus, like the FCC, the FPC, the Secretary of H.E.W. and other agencies, the NLRB is an adverse party in court because adjudication is being sought of *its* right to grant relief in behalf of the prevailing party before it. The Director, Office of Workmen's Compensation Programs has no enforcement powers comparable to those of the NLRB.

Moreover, it is not the decision of the *Director* which is called into question by a petition for review under 33 U.S.C. § 921(c), but that of the Benefits Review Board. Thus, the Director does not possess even a concrete interest in defending his *own* decision in court, as does, for example, a district judge against whom a writ of mandamus is sought. As we noted in the majority panel opinion, the Benefits Review Board has specifically asked that it *not* be denominated a party respondent in these proceedings. To that request, we acceded.

The Secretary of Labor's administrative duties, delegated to the Director, *see* 20 C.F.R. § 701.202, are set out in 33 U.S.C. § 939. Subsection (c) (1) is most arguably relevant to the Director's stake in the Board's decisions:

> The Secretary shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedures for obtaining such compensation and including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available.

But we do not think that these duties provide the requisite stake. They do not confer upon the Director any specific interest in the proper administration of the Act.

In United States ex rel. Chapman v. F.P.C., 191 F.2d 796, 799-800 (4 Cir. 1951), *rev'd*, 345 U.S. 153 (1953), we held that the Secretary of the Interior lacked standing to challenge an order granting a license to a private company to construct a dam. The Secretary claimed to be affected by the order because it was his statutory duty to market surplus electrical power from

publicly constructed dams. The Supreme Court reversed without opinion on this point, upholding standing. 345 U.S. at 156. *See* 3 K. Davis, supra, § 22.15 at 280.

The Director asserts that *Chapman* supports his position before us, but we disagree. The Secretary of the Interior in *Chapman did* have some stake in the outcome: it would have been harder for him to market public power if another private dam was built. Alternatively, if the private project was disapproved, it would have been more likely that a public dam would eventually have been built, in which case the Secretary would have had more power to market. Thus, regardless of whether the Secretary was faced with a surplus or a shortage of electrical power to market under his statutory authority, the FPC's decision would directly affect him in the performance of his marketing obligations. The Director in this case has no such specific interest. Therefore, we read *Chapman* to suggest that the Director does not have a stake in the outcome and cannot be a party.

The lack of a stake in the outcome on the part of the Director would appear to end our inquiry. The Director argues, however, that because he is a party to proceedings before the Board, 20 C.F.R. § 801.2(10), it would be anomalous if he were not a party before this court. There are several answers to this argument. First, of course, that the Director is a party to proceedings before the Board does not alter the fact that he has no direct stake in the outcome of the case, is not a person aggrieved by Board action and is thus without a case or controversy to assert. Second, the fact that one is permitted to be a party to administrative proceedings

does not require that one be entitled to initiate judicial review of those proceedings:[5] in the former case, the participant may perform a useful role by calling to the administrative agency's attention considerations it could not on its own initiative, much in the way that an intervenor would in this court; in the latter situation, however, the hopeful party is seeking to initiate a new level of proceedings because of dissatisfaction with the result below. *See* 3 K. Davis, supra, § 22.08 at 242.

Finally, it would appear even from the regulations implementing the Act that the Director is not *automatically* to be a party in this court, even though he is automatically a party before the Board. In 20 C.F.R. § 801.2(10), "party" is defined as follows "the Secretary or his designee *and* any person or business entity aggrieved or directly affected by the decision or order from which an appeal to the Board is taken." (Emphasis added.) However, 20 C.F.R. § 802.410 provides: "any *party* adversely affected or aggrieved by such decision [of the Board] may take an appeal to the U. S. Court of Appeals . . . ." (Emphasis added.) Thus, the Secretary

5. While the Director here seeks to be named a *respondent* to a petition for review, a holding that he is a "person aggrieved" whose presence insures proper adversity would necessarily lead to the conclusion that he is entitled to petition for review of a decision of the Benefits Review Board of which he disapproves: if the Director has an interest in sustaining a Board decision with which he agrees, then he also has an interest in overturning a decision with which he disagrees. We would not readily subject the LHWCA to a construction under which the official charged with administering the Act could invoke the aid of the federal courts to reverse the decision of the board responsible for adjudicating claims under the Act. The unfairness of such a result is manifest if one contemplates the possibility that in some future case the Director, in furtherance of his asserted interest in determining "the proper scope of coverage of the Act," might seek to reverse an award to a claimant on the ground that the Board had been too generous.

is a "party" before the Board even if he is not "aggrieved"; but to be entitled to participate in court proceedings, the Secretary, although a "party" below, must, like any other "party," be adversely affected.

In summary, we stand firm in our conclusion that the Director is not automatically a respondent in a review proceeding under § 921(c).

In our earlier opinion, we added that we did not decide that "a court of appeals may not, in a proper case, permit intervention by others [including the Director] who have an interest at stake . . . ." We elaborate on that comment: The Director unquestionably has a right to seek to intervene under Rule 24(b), Fed. R. Civ. P.,[6] and an application will ordinarily be granted. See 3B J. Moore, Federal Practice § 24.10[5]; 7A C. Wright & A. Miller, Federal Practice and Procedure § 1912. The Director has not, however, sought intervention in these cases. We assume that he has not done so because he does not wish to render moot his assertion that such a request on his part is unnecessary. Having decided that such a request is necessary, we will still consider such a request on his part should he be advised to make it.

Nos. 75-1051 and 75-1088 — REVERSED.
Nos. 75-1075 and 75-1196 — AFFIRMED.
Each Party to Pay His Own Costs.

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6. The Federal Rules of Civil Procedure principally govern procedure in the United States district courts in suits of a civil nature, Rule 1, but Rule 81(c) makes them applicable also to review proceedings under the Act to the extent that the Act does not prescribe procedure.

BUTZNER, Circuit Judge, dissenting:

I

I believe that the Director, Office of Workmen's Compensation Programs, should be recognized as a party to these proceedings. This issue raises a simple question of statutory construction. In 33 U.S.C. § 939(c), Congress authorized the Secretary of Labor to assist claimants and to provide them legal assistance. This statute must be read along with 33 U.S.C. § 921(a), which provides that attorneys appointed by the Secretary shall represent him before the courts of appeals. The Secretary has properly delegated his responsibilities to the Director.

Regulations under the Act establish the Director as a party before the Benefits Review Board. 20 C.F.R. § 801.3(10). His stake in the proceedings arises out of the duty imposed by 33 U.S.C. § 939(c)(1) to assist claimants. Thus, the Director, like any other party before the Board, is aggrieved within the meaning of 33 U.S.C. § 921(c) by an adverse decision of the Board. If he deems the decision erroneous, his statutory duty to assist the claimant includes seeking review. If the decision favors the claimant, the statute authorizes the Director to support the award on review.

In sum, the Act expressly places on the Secretary or his designee, the Director—not upon the courts of appeals—the responsibility of determining when the Director should participate in the review of the Board's orders. Congress did not condition the Director's appearance in our court on our granting or withholding permission.

The difference between the Director's status as a permissive intervenor and as a party is more than a technical nicety. The majority rule, as I see it, will create road-blocks to filing petitions for review and certiorari, and it will provoke extended litigation over whether the Director's position in a given case satisfies the requirements of Rule 24(b). Other circuits have wisely recognized the Director's status as a party. *See, e.g.,* Pittston Stevedoring Corp. v. Dellaventura, No. 76-4042 (2d Cir. March 16, 1976); McCord v. Cephas, No. 74-1948 (D.C. Cir. March 25, 1975). I am not persuaded that we should differ from their sound conclusions.

II

I fully agree with Judge Craven that the point of rest theory espoused by the majority of the court is a judicial gloss on the 1972 Amendments of the Longshoremen's and Harbor Workers' Compensation Act, which is warranted by neither the Act nor its legislative history. *See* I.T.O. Corp. v. Benefits Review Board, 529 F.2d 1080, 1089 (4th Cir. 1975) Craven, J., dissenting). I add only these brief observations. A careful study of the majority opinion filed when this case was heard by a panel, *I.T.O. Corp.*, 529 F.2d at 1081, discloses that the effect of the point of rest theory is to deprive longshoremen of coverage under the Act when they are injured while stuffing or stripping a ship's containers at a marine terminal. The slight modification of the theory in the majority's per curiam opinion alleviates some, but not all, of its harsh results. It does so, however, at the expense of adding the factor of lapse of time to the vague concept of place for determining

the point of rest. Rational, uniform application of the court's theory to the myriad circumstances in which injuries occur will be most difficult.

Judge Craven initially voted with the majority to deny the Director standing as a party to these proceedings. On en banc reconsideration, he is now persuaded otherwise, and concurs in Judge Butzner's opinion.

APPENDIX G

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 75-2039

Sea-Land Service, Inc., and The Travelers Insurance Company, Petitioners,

vs.

Director, Office of Workers' Compensation Programs, United States Department of Labor, and Wallace C. Johns, Respondents.

(Benefits Review Board Nos. 75-124 & 75-124A)

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on petition for review of an order of the benefits review board united states department of labor

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Argued June 8, 1976

Before Aldisert, Gibbons and Garth, Circuit Judges

Opinion of the Court

(Filed Aug. 5, 1976)

M. E. DeOrchis, Esq.
Kenneth L. Geller, Esq.
Haight, Gardner, Poor & Havens
One State Street Plaza
New York, New York 10004
Attorneys for Petitioners

William J. Kilberg,
Solicitor of Labor
Laurie M. Streeter,
Associate Solicitor
Linda L. Carroll,
Attorney, United States Department of Labor
200 Constitution Ave., N.W.
Suite N-2716
Washington, D.C. 20210
Attorneys for Director, Office of Workers' Compensation Programs

Martin L. Katz, Trial Counsel
Paul C. Johns, Esq.
185 Montague Street
Brooklyn, New York 11201
Attorneys for Respondent Wallace C. Johns

Gibbons, Circuit Judge

This is a petition by an employer to review an order of the Benefits Review Board reversing an order of the administrative law judge which denied benefits to an employee, Wallace Johns, under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).[1] The administrative law judge had held that although Johns was engaged in maritime employment at the time of the accident, he was not injured at a situs within the coverage of the Act. The Board concluded that Johns was engaged in maritime employment and was injured at a covered situs. The problem arises out of the 1972 amendments to the LHWCA,[2] and is of first impression in this court.

Johns was employed at the time of the accident by Sea-Land Service, Inc., an intermodal frieght carrier that engages in shipping, stevedoring, warehousing, freight consolidation and motor fright operations. Johns' injury occurred when the flatbed truck he was driving, laden with a large crate, overturned on a public street in Port Elizabeth, New Jersey. Port Elizabeth is a part of the sprawling marine terminal area in Newark and Elizabeth, New Jersey that is operated by the Port of New York and New Jersey Authority. Many longshoremen who are covered by the LHWCA are employed at various locations in the marine terminal area. Many other workers in the terminal area are employed by

1. 33 U.S.C. §§ 901-50. We have jurisdiction under 33 U.S.C. § 921(c) for although the Benefits Review Board ordered a remand to the administrative law judge for the calculation of the exact amount of benefits, that calculation was made and the order was for all purposes final by the time this court was called upon to consider the petition. *Compare* Sun Shipbuilding & Dry Dock Co. v. Benefits Review Board, No. 75-1715 (3d Cir. 1976).

2. Pub. L. No. 92-576, 86 Stat. 1251.

railroads, and are covered by the Federal Employers' Liability Act.[3] Still others, including teamsters, warehousemen, clerks, secretaries and even bank tellers, who work in the marine terminal area are covered by the New Jersey Workmen's Compensation Act.[4] All, or at least most, of these employees, are engaged in facilitating the transfer of cargo at the interface between waterborne modes of transportation and land or airborne modes of transportation. Our problem in this case is to determine on which side of the interface Johns was employed when he was injured. That his employer is an inter-modal carrier complicates the problem somewhat, although analytically the fact that a single corporate employer operates several modes of transportation should not influence our judgment respecting the statutory reach of the federal and state workmen's compensation laws.

I

Johns was a member of the International Longshoremen's Association, but he was not regularly employed by Sea-Land. On the date of the accident Johns had been hired by Sea-Land for the day (a "shape-up" employee) through the By-State Waterfront Commission, which operates a longshoring hiring hall. After appearing for work, Johns agreed to work as a shuttle driver, moving with a tractor rig trailers between Sea-Land's old terminal facility at Berth 52, and its new terminal at Berth 90. Both terminal facilities were enclosed by a fence and were under the control of the employer. The

3. 45 U.S.C. §§ 51-60.

4. N.J. Stat. Ann. § 34:15.

shuttle-run between the two terminals followed public streets for a distance greater than a mile and a half. Johns began his day by hitching a trailer to his tractor at Berth 52 and moving it to Berth 90. While he was making a turn from Rangoon Street onto Bombay Street, an intersection in the public area of the marine terminal, situated one-half mile from the nearest water and one-third mile from Sea-Land's property, the rig over-turned and caused Johns' injury. On the day of the accident Sea-Land was in the process of moving its operations from Berth 52 to a larger facility at Berth 90.

Johns originally filed a claim against Sea-Land with the New Jersey Department of Labor and Industry. Payments were made under the New Jersey schedule from January 31, 1973 until March 16, 1973. On July 5, 1973 Johns filed a new claim under the federal statute, which provides for higher benefits. Sea-Land resisted that claim, contending that at the time of the injury the claimant was covered by the New Jersey and not the federal statute. The formal proceedings before the administrative law judge and the Benefits Review Board produced the results described above. Neither the administrative law judge nor the Board made any findings with respect to the contents of the crate that Johns was hauling at the time of the accident, its origin, or its destination. Nor did either make any finding as to whether a vessel was berthed at or expected at Berth 52. Under our interpretation of the 1972 Amendments these facts may be of critical importance.

II

Prior to 1972 the term "employee" was defined in §2(3) of the LHWCA, 33 U.S.C. §902(3) only negatively:

> "The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

The scope of the Act's affirmative coverage was derived from the definition of "employer" in §2(4), and the "coverage" provision in §3(a). An "employer" was described as an employer of persons "employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." 33 U.S.C. §902(4). Compensation was payable under §3(a) "only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death—through workmen's compensation proceedings may not validly be provided by State law." 33 U.S.C. §903(a). The pre-1972 definitions had originated in the 1927 statute, which was tailored by Congress to fill a void created by the Supreme Court's holding in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), that state workmen's compensation laws were inoperative in the navigable waters of the United States. *See* G. Gilmore & C. Black, The Law of Admiralty §6-45 (2d ed. 1975). The *Jensen* decision left longshoremen injured on the landward side of a pier with a possible remedy under state workmen's compensation laws, but in the absence of federal legislation not covered when they stepped from the pier onto the gangplank. *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263 (1922). The 1927 statute, instead of adopting federal coverage for the entire longshoring operation, merely provided a remedy which filled in the gap created by the *Jensen* holding. *See* Gilmore & Black, *supra*, §6-48, at 417. In *Nacirema Op-*

erating Co. v. Johnson, 396 U.S. 212 (1969), the Court held that the Extension of Admiralty Jurisdiction Act of 1948, 46 U.S.C. §740, did not change the basic approach of the 1927 statute, and that pierside injuries were still covered by state workmen's compensation laws. The *Nacirema* court made it clear, however, that there was no constitutional barrier to congressional action preempting the entire longshoremen's compensation field to the exclusion of state law.[5] It merely held that the 1927 statute could not be so construed. That holding pointed up the continuing anomaly that the schedule of benefits to be applied in any case depended on whether the injury occurred on the land or water side of the gangplank.

In 1972 Congress addressed this anomaly in a complex statute reflecting a number of compromises among conflicting interests.[6] Of concern for purposes of this case

5. The Court said:

> There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act. And construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court.

396 U.S. at 223-24.

6. We have considered other aspects of the 1972 amendments in Atlantic & Gulf Stevedores, Inc. v. Director, Office of Workers' Compensation Programs, No. 75-1810 (3d Cir. June 23, 1976) and Nacirema Operating Co. v. Benefits Review Bd., No. 75-1984 (3d Cir. July 2, 1976). *See also* Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 38-41 (3d Cir. 1975), *cert. denied*, 96 S.Ct. 785 (1976).

are the revised definitions of "employer," §2(3), and "employee," §2(4), and the revised "coverage" provision of §3(a). In place of the merely negative definition of "employee" given by the 1927 Act (which excluded crew members), Congress substituted the following language:

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

33 U.S.C. §902(3).

Thus the exclusion of crew members[7] was retained, but an affirmative listing of occupations functionally related to the maritime transportation industry was added. For this case the key words are "longshoreman or other person engaged in longshoring operations."

The 1972 amendments also changed the "employer" definition by omitting the limitation "upon the navigable waters of the United States" and substituting

> "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part upon the navigable waters of the United States (including any adjoining pier,

7. Crewmen may, of course, recover for injury under the Jones Act, 46 U.S.C. § 688.

> wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)."

33 U.S.C. §902(4).

The new definition quite clearly was intended to afford coverage in places which under the 1927 statute had been left to the state workmen's compensation acts. That this was intended is confirmed by the "coverage" provision. The 1972 amendment to § 3(a) omitted the qualification "and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law," and thus abandoned the 1927 approach of providing a mere interstitial remedy which deferred to state law to the maximum extent permissible under the *Jensen* holding. As amended, § 3(a) provides:

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel) . . ."

33 U.S.C. § 903(a).

Thus the "coverage" provision and the "employer" definition manifest an unmistakable congressional intention to afford federal coverage for injuries occurring in areas inland of the navigable waters of the United States where prior to 1972 Congress had deferred to state law. *See generally* Gilmore & Black, *supra*, §6-50.

III

In considering the merits of Johns' claim for compensation under the LHWCA as amended, both the administrative law judge and the Benefits Review Board construed the Act to posit twin requirements for coverage. In the definition of "employee" they perceived a "status" test, i.e., whether Johns was "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations. . . ." The Board and the administrative law judge understood § 2(4), the employer definition section, to impose an additional requirement for coverage; namely, that an accident occur upon the navigable waters of the United States (including enumerated adjoining facilities). The Board and the administrative law judge agreed that Johns satisfied the status test. The administrative law judge concluded, however, that the accident took place at a situs that the 1972 amendments did not reach. It was this latter conclusion with which the Benefits Review Board disagreed.[8] Because

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8. The Board's entire discussion of this point of disagreement was set out in two paragraphs:

> The administrative law judge relied essentially on *Perdue v. Jacksonville Shipyards, Inc.*, 74-LHCA-58 (Sept. 19, 1974), in determining that the accident did not occur upon "navigable waters". The Board has since reversed that decision, and no purpose would be served by restating our reasoning here. *See Perdue v. Jacksonville Shipyards, Inc.*, 1 BRBS 297, BRG No. 74-200 (Jan. 31, 1975).
>
> The Act does not require that the injury occur on property owned by the employer. It is enough if the accident takes place in an ". . . adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U.S.C. § 903(a). The situs of claimant's injury qualifies as such an area since it is directly related to, and an essential part of, the employer's longshoring operations. To hold otherwise would contravene the legislative intent of the 1972 amendments to the Act, which were enacted, in part, to eliminate the circumstance of having persons engaged in maritime employment walk into and out of the Act's coverage during the

of the inadequacy of the record compiled in the administrative proceedings, we are not in position to either approve or disapprove the Board's decision and must remand for additional fact-findings. Nor are we certain that the Board has properly interpreted the scope of the 1972 amendments, a task of no little difficulty as several diverging opinions demonstrate. *See, e.g., Pittston Stevedoring Corp. v. Dellaventura,* No. 76-4042 (2d Cir. July 1, 1976); *I.T.O. Corp. v. Benefits Review Board,* 529 F.2d 1080 (4th Cir. 1975), *rehearing en banc granted* (March 12, 1976); *Weyerhaeuser Co. v. Gilmore,* 528 F.2d 957 (9th Cir. 1975), *petition for cert. filed,* 44 U.S.L.W. 3645 (U.S. May 6, 1976) (No. 75-1620), and one to which we now turn.

IV

As has been noted, *see Southern Pacific Co. v. Jensen, supra,* the Constitution forbids state compensation laws to intrude on the navigable waters of the United States. On those waters the federal law-making power is exclusive, but the scope of congressional power to enact federal compensation legislation pursuant to its admiralty jurisdiction is, of course, defined by the test of navigability. *State Industrial Commission v. Nordenholt Corp., supra; Victory Carriers, Inc. v. Law,* 404 U.S. 202, 210 (1971). Doubtless Congress could, in lawful exercise of its commerce power, have supplanted state workmen's compensation remedies throughout the entire range of interstate and foreign commerce. But if a suit for workmen's compensation is an action at law for purposes of

workday. *See Herron, Jr. v. Brady Hamilton Stevedore Co.,* 1 BRBS 273, BRB No. 74-171 (Jan. 23, 1975); *O'Leary v. Southeast Stevedore Co.,* 1 BRBS 498, BRB No. 74-228 (May 30, 1975).

the seventh amendment then any federal compensation law whose coverage extended beyond the limits of admiralty jurisdiction could not be administered under the existing scheme, without provision for jury trial. *See Frank Irey, Jr. v. OSHRC,* 519 F.2d 1200, 1207 (3d Cir. 1974), *on rehearing in banc,* 519 F.2d 1215, 1219 (3d Cir. 1975) (Gibbons, J. dissenting), *cert. granted,* 44 U.S.L.W. 3531 (U.S. Mar. 22, 1976) (No. 75-748); *United States v. Stoeco Homes, Inc.,* 498 F.2d 597, 609-10 (3d Cir. 1974), *cert. denied,* 420 U.S. 927 (1975). To the extent that compensation claims concern subject matter within Congress' legislative jurisdiction in admiralty, however, it is well-settled that no right to jury trial exists. *Crowell v. Benson,* 285 U.S. 22, 45 (1932); *Propeller Genesee Chief v. Fitzhugh,* 53 U.S. [12 How.] 443, 452-53, 459-60 (1851); *Waring v. Clarke,* 46 U.S. [5 How.] 441, 459-60 (1847). Because we assume Congress was aware of the administrative difficulties that would attend upon a commerce-based federal compensation law, we do not believe that in enacting the 1972 amendments to the LHWCA, Congress intended to exercise any legislative power other than its admiralty jurisdiction.[9] *See Pittston Stevedoring Corp v. Dellaventura,*

9. The problem of tracing congressional legislation to its intended constitutional source is often perplexing in the maritime context because admiralty jurisdiction closely interfaces with commerce jurisdiction. When Congress in 1845 extended admiralty jurisdiction to the Great Lakes and navigable waters connecting same, Act of Feb. 26, 1845, 5 Stat. 726, it was much mooted whether the Act was a regulation of commerce or of admiralty. There is some evidence that Justice Story, the draftsman of the legislation regarded the Act as an exercise of commerce power, although the Supreme Court sustained the Act on the latter ground, expressly disavowing the commerce clause basis. *See Propeller Genesee Chief v. Fitzhugh, supra.* For an absorbing discussion of the problem see C. Swisher, History of the Supreme Court of the United States, Vol. 5: The Taney Period, 1836-64 at 423-66 (1974).

supra, No. 76-4042 at 4720-22; Gilmore & Black, *supra,* § 6-48 at 417-18. Our problem then, is to decide the extent to which Congress has exercised the power vested in it by Article III, Section 2 of the Constitution. *Panama R.R. v. Johnson,* 264 U.S. 375, 386 (1924).

It seems likely, although by no means certain, that Congress could, pursuant to its admiralty jurisdiction, enact a comprehensive workmen's compensation law for maritime employees that provided coverage for injuries sustained in such employment, no matter where they may occur. Justice Story described the admiralty jurisdiction in tort as limited to events actually taking place on the waters, *see DeLovio v. Boit,* 7 Fed. Cas. 418, 444 (No. 3,776) (C.C.D. Mass. 1815), while at the same time describing admiralty jurisdiction in contract as comprehending.

> "all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) which relate to the navigation, business or commerce of the sea."

Id. See also Insurance Co. v. Dunham, 78 U.S. [11 Wall.] 1,35 (1870). A claim for compensation for personal injury on a theory of strict liability does not fit perfectly into the mold of either admiralty tort or admiralty contract law. We find guidance in determining the limits of congressional law-making authority respecting such subject matter in contract and other cases where the jurisdictional limits are not spatially defined, but depend on the presence of a nexus between the employer-employee relationship and maritime commerce. The maintenance and cure cases are particularly good analogies, because the seaman's right

to maintenance and cure is closely related to the workman's right to compensation without fault for injury or death. *See Gilmore & Black, supra,* §6-6, at 281-82. The right to maintenance and cure arises from the fact of the employment relationship (in the service of the ship) and amounts virtually to strict liability. It is now clearly established that a seaman who is stricken with illness or injury is entitled to maintenance and cure even though the accident or illness occurs during shore leave not directly connected with the ship's business. *See Warren v. United States,* 340 U.S. 523 (1951); *Farrell v. United States,* 336 U.S. 511 (1949); *Aquilar v. Standard Oil Co.,* 318 U.S. 724 (1943). By the same token, it should be within Congress' legislative jurisdiction under Article III, Section 2 to provide a remedy for persons injured in the course or maritime employment, irrespective of the place of injury. It is the existence of the special employer-employee relationship, and not the situs of that relationship, that is significant for purposes of admiralty jurisdiction. We find support for this thesis in *Victory Carriers, Inc. v. Law, supra,* where the Supreme Court indicated that only congressional inaction stood between the Court's acquiescence in the extension of admiralty tort jurisdiction shoreward from its historical outpost on the edge of the navigable waterways. *See* 404 U.S. at 204, 214. *See also Gutierrez v. Waterman Steamship Corp.,* 373 U.S. 206 (1962).

Having fixed the limits of congressional law-making authority in admiralty, it remains to be considered the extent to which Congress in the 1972 amendments to the LHWCA invoked that power. We are met at the outset with a conflict of authority. Both the administrative law judge and the Benefits Review Board employed concurrent tests of "status" and "situs" to define the Act's coverage.

Accord, I.T.O. Corp. v. Benefits Review Board, supra. Gilmore and Black acknowledge that there is evidence in the legislative history suggesting that Congress intended to structure the Act's coverage in such a fashion, but urge for policy reasons that the status test be discarded and the situs test be made determinative. *See* Gilmore & Black, *supra,* § 6-51. Judge Friendly rejects this latter position, but concededly adopts an approach that "goes some way" toward "read[ing] the status requirement out of the Act." *Pittston Stevedoring Corp. v. Dellaventura, supra,* No. 76-4042 at 4719. Although we find merit in these positions, we prefer to view the problem from a fresh perspective.

Prior to the 1972 amendments to the LHWCA, coverage analysis of necessity involved application of the bifurcated status-situs test. The *Jensen* case fixed the constitutional limit of the state law-making authority to which Congress deferred at the boundary of congressional legislative jurisdiction in admiralty, i.e., at the edge of the navigable waterways. The 1927 Act established a federal compensation remedy for maritime employees, but only to the extent necessary to fill *Jensen's* preemptive void. There was a perfect interface, without overlap, between federal and state law, *see Nacirema Operating Co. v. Johnson, supra,* and courts were forced to consider in each case, from the location of the accident, whether state or federal remedies were to be provided.

In the 1972 amendments, however, Congress abandoned the policy of deference to state law-making power. It invaded what had theretofore been the sole preserve of the states by extending the LHWCA's coverage to some part of the domain in which the states could legislate. The line

delimiting the outer reaches of the Act's extended coverage is, we think, functional and not spatial.

Apart from increasing the maximum allowable benefits in exchange for the elimination of the *Sieracki-Ryan*[10] circle of liability, the dominant purpose of the 1972 amendments in extending the Act's coverage to areas previously left to the states was to make more uniform the death and disability compensation system for maritime employees so that maritime workers would no longer walk into federal coverage and out of state coverage, and vice versa, in the course of a day's work. This sentiment is clearly expressed in identical language in both the House and Senate reports accompanying the legislation:

> Extension of Coverage to Shoreside Areas
>
> The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.
>
> To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maxi-

10. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956). *See* Griffith v. Wheeling Pittsburgh Steel Corp., *supra,* 521 F.2d at 38-40.

mum limit on benefits of not less than 200% of statewide average weekly wages. . . .

* * *

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, ship-breakers, and other employees engaged in maritime employment (excluding masters and members of a crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship

and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

S. Rep. No. 92-1125, 92d Cong., 2d Sess. 12-13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., 1972 U.S. Code Cong. & Admin. News 4707-08. The reference in §§902(4) and 903(a) to the navigable waters of the United States should be regarded no more than a shorthand way of relating the function being performed by the injured employee to waterborne transportation, the jurisdictional nexus. We recognize that both of these statutory provisions, as amended in 1972, further state that the

"navigable waters" shall include "any adjoining pier, wharf, dry dock, terminal, building van, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." But we do not construe this enumeration of covered areas to be an exclusive enumeration. Congress was cautious in its language, but the fact remains that it intended to expand the scope of the LHWCA to provide a federal workmen's compensation remedy for all maritime employees. We believe that Congress has exercised in full its legislative jurisdiction in admiralty. As long as the employment nexus (status) with maritime activity is maintained, the federal compensation remedy should be available. Resuscitating the situs requirement in cases satisfying the status test will interfere with Congress' intention to eliminate the phenomenon of shifting coverage. It is the situs of the vessels in maritime commerce, not the situs of their maritime employees, at the time of the injury, that in our view Congress referred to by its reference to navigable waters.

We concede, as we must, that the draftsmanship of the 1972 amendments leaves something to be desired and, to a certain extent, obscures this purpose from view. But the overall intention appears to be to afford federal coverage to all those employees engaged in handling cargo after it has been delivered from another mode of transportation for the purpose of loading it aboard a vessel, and to all those employees engaged in discharging cargo from a vessel up to the time it has been delivered to a place where the next mode of transportation will pick it up. A stevedore may receive cargo at one situs and move it over public streets to another situs for loading on a vessel, or may discharge cargo and transport it to a situs not immediately adjacent to a pier for delivery to a truck or rail carrier. The limits of federal coverage is defined not by reference to a geographical relationship with the navigable waters of the United States, but by the location of the interface between the air, land and water modes of transportation. If that interface is customarily located at some point remote from the pier, the fact that the stevedore uses public streets to move the cargo to or from a "terminal", a "building" or "other adjoining area" does not affect coverage. The key is the functional relationship of the employees activity to maritime transportation, as distinguished from such land-based activities as trucking, railroading or warehousing.

We believe that our view of the 1972 amendments is in substantial conformity with that of Judge Craven, dissenting from the panel opinion in *I.T.O. Corp. v. Benefits Review Board, supra.* In that case a divided court held that the 1972 amendments preserved the dual status-situs test for coverage, and that federal coverage began at the "*first* storage or holding area on the pier, wharf, or terminal adjoining navigable waters", and ended at the "*last* storage or holding area on the pier, etc., to the ship, which it called the "point of rest." 529 F.2d at 1087 (emphases in original). Judge Craven in dissent rejected the "point of rest" analysis as inconsistent with the plain language of the Act, *accord, Pittston Stevedoring Corp. v. Dellaventura, supra,* No. 76-4042 at 4712, and urged that longshoring under the statute was a continuous process involving different employees, which continued at all times while the cargo was in maritime commerce as distinguished from land commerce. Although Judge Craven's terminology and ours are somewhat different, we think that our perceptions of the congressional intention are essentially

the same. The line which Congress intended to draw was between maritime commerce and land commerce, and the coverage of the federal law starts at the point where the cargo passes to or from an employer engaged in the former to an employer engaged in the latter. That the one employer may be engaged in both types of commerce is irrelevant. The line should still be drawn where cargo is delivered to a segregated place for delivery to the next mode of transportation.

We note that defining the scope of federal workmen's compensation coverage in this manner is consistent with the provisions of the Harter Act, 46 U.S.C. §193, and the Carriage of Goods by Sea Act, 46 U.S.C. § 1303(3), defining the point at which the responsibility of the maritime carrier begins. While these statutes do not tell us what the Ninety-Second Congress had in mind when it passed the LHWCA amendments, there is some virtue in a construction of the latter statute that produces consistency with other enactments relating to maritime commerce.

V

We are thus in agreement with the Benefits Review Board that coverage under the Act is not foreclosed by the fact that the accident occurred on a public street in the marine terminal not under the employer's control. But that conclusion only begins the appropriate inquiry. On the day of the accident, according to the evidence, Johns, at Berth 52, hitched a Sea-Land tractor to a container which had just come off a ship at that berth, and took the container to Berth 90, where Sea-Land stored containers. If Johns were an over-the-road driver who picked up the trailer on the pier for delivery to a consignee elsewhere, we would have no difficulty in holding

that the interface between water and land transportation took place at Berth 52 and that New Jersey law covered any subsequent injury to the driver. On the other hand, transporting a discharged container to a temporary storage area at Berth 90 appears equally clearly to be related to the stevedoring function rather than to the land transportation function. Likewise, if the crate which Johns was moving at the time of the accident had been received at Berth 90 from a land mode of transportation, or even another water carrier, for temporary storage until it could be loaded on a vessel, and Johns was moving it to Berth 52 to be so loaded, we would hold that there was federal coverage at the time of the accident.

Our difficulty is that while the evidence respecting Johns' initial trip between Berth 52 and Berth 90 is clear enough the record is decidedly equivocal about the return trip, during which the accident occurred. Johns testified that he thought the crate was full and was going to a ship, but he gave no information about its source and no other information about its destination. The testimony of William Warnock, the employer's claims adjuster, suggested that Johns may have been mistaken, and may actually have been shuttling equipment between the two terminals, where warehousing and the storage of trailers also takes place. Neither the administrative judge nor the Board made specific findings on this crucial issue. What is clear is that shape-up laborers, hired by the day are sometimes used to perform what are clearly tasks in maritime employment and are sometimes used in Sea-Land's trucking and warehousing operations. All are members of the longshoremen's union, but obviously that fact is not dispositive of the reach of the federal statute. A great deal of the evidence and argument in the agency proceedings was

devoted to the situs of the accident and to control over that situs. Evidence bearing upon the specific function of Johns at the time of injury was inadequately developed. Because the inquiry in the proceedings below was misdirected, a remand is necessary.

VI

The Director, Office of Workers' Compensation Programs, contends that Sea-Land's petition for review should be dismissed because the employer did not cross-appeal to the Benefits Review Board from the favorable decision of the administrative law judge. The simple answer is, as we pointed out in *Atlantic & Gulf Stevedores, Inc. v. Director, Office of Workers' Compensation Programs,* No. 75-1810 (3d Cir. June 23, 1976), that the employer was not aggrieved by that order and could not take an appeal therefrom to the Benefits Review Board. 33 U.S.C. § 921(b)(3); 20 C.F.R. § 802.201(a) (1974). Sea-Land was aggrieved by the Board's action, however, and properly seeks judicial review.

Conclusion

The order of the Benefits Review Board will be set aside and the case will be remanded for a determination, consistent with this opinion, as to whether at the time of the injury Johns was engaged in maritime or non-maritime employment. On remand the trier of fact[11] may take additional testimony on that issue if in its view the present record does not contain sufficient evidence for that purpose.

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11. Under the statute the administrative law judge and not the Benefits Review Board is the trier of fact. *See* 33 U.S.C. § 921(b)(3).

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1004, 1014, 1044, 1111

September Term, 1975

Argued May 20, 1976 Decided July 1, 1976

Docket No. 76-4042

Pittston Stevedoring Corporation and
The Home Insurance Company,
Petitioners,

v.

Anthony Dellaventura,
Respondent,

and

Director, Office of Workers' Compensation Programs, U.S.D.L.,
Party in Interest.

Docket No. 76-4009

Northeast Marine Terminal Company, Inc.,
Employer

and

State Insurance Fund, Carrier,
Petitioners,

v.

Ralph Caputo, Claimant

and

Director, Office of Workers' Compensation Programs, United States Department of Labor,
Respondents.

Docket No. 76-4043

Pittston Stevedoring Corporation,
Petitioner,

v.

John Scaffidi,
Respondent.

Docket No. 75-4249

Carnelo Blundo,
Claimant-Respondent,

v.

International Terminal Operating Company, Inc.,
Self-Insured Employer-Petitioner,

Director, Office of Workers' Compensation Programs, United States Department of Labor,
Respondent.

Before LUMBARD, FRIENDLY and OAKES, Circuit Judges.

Petition to review four orders of the Benefits Review Board granting awards under the Longshoremen's and Harbor Workers' Compensation Act. One petition is dismissed as untimely and a second as having been mooted by payment of the award by the insurance carrier; the other two awards are affirmed.

Joseph F. Manes, Esq., Croton-on-Hudson, N.Y., for Pittston Stevedoring Corporation and The Home Insurance Company.

William M. Kimball, Esq., New York, N.Y. (Burlingham Underwood & Lord,, Esqs., of Counsel), for Northeast Marine Terminal Company and State Insurance Fund.

Leonard J. Linden, Esq., New York, N.Y. (Linden & Gallagher, Esqs., of Counsel), for International Terminal Operating Company, Inc.

Angelo C. Gucciardo, Esq., New York, N.Y. (Israel, Adler, Ronca & Gucciardo, Esqs., of Counsel), for Respondents Dellaventura, Caputo, Scaffidi and Blundo.

Ronald E. Meisburg, Esq., U.S. Department of Labor, Washington, D.C. (William J. Kilberg, Solicitor of Labor; Laurie M. Streeter, Associate Solicitor; Jean S. Cooper, Esq., a Francine K. Weiss, Esq., Department of Labor, of Counsel), for Director Office of Workers' Compensation Programs.

Thomas W. Gleason, Jr., New York, N.Y., (Irwin Herschlag, esq., New York, N.Y., of Counsel), for International Longshoremen's Association, AFL-CIO, *Amicus Curiae*.

Thomas D. Wilcox, Esq., Washington, D.C., for National Association of Stevedores, *Amicus Curiae*.

FRIENDLY, Circuit Judge:

We have here four petitions under 33 U.S.C. § 921(c), by employers, in some instances joined by their insurance carriers, to review orders of the Benefits Review Board (BRB) affirming compensation awards made to four em-

ployees under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended in 1972, 33 U.S.C. §§ 901 et seq.[1] They present a question of considerable importance, namely, how far the 1972 Amendments extended the coverage of LHWCA.

Presented with the same general issue, a divided panel of the Fourth Circuit ruled in favor of the employers, *I.T.O. Corporation of Baltimore v. Benefits Review Board, U.S. Dep't of Labor and Adkins,* 529 F.2d 1080 (1975), holding that the Act extended benefits only to persons injured while unloading cargo from the ship to what the majority termed a "first point of rest," i.e., the first place where the cargo is deposited on a pier or terminal area after being unloaded, and to person injured while loading cargo from the "last point of rest," 529 F.2d at 1081. The *I.T.O.* case has been reheard *en banc*. We are told that only one other circuit has construed the extended coverage provisions here at issue, *Weyerhaeuser Co. v. Gilmore,* 528 F.2d 957 (9 Cir. 1975), rehearing denied, Feb. 6, 1976, petition for cert. filed, No. 75-1620, 44

1. The Benefits Review Board was created by the 1972 Amendments to the LHWCA as an independent, "quasi-judicial" body within the Department of Labor. 33 U.S.C. § 921(b)(1); 20 C.F.R. § 801.103 (1975). Its three members are appointed by the Secretary of Labor, and it is "authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter," made by the administrative law judges who hear LHWCA claims in the first instance. 33 U.S.C. §§ 919(d), 921(b)(1) and (3) (as amended). Prior to the 1972 amendments, there was no administrative review procedure for LHWCA claims; cases were heard in the first instance by Deputy Commissioners and review was then had in the United States district courts. 33 U.S.C. § 921 (1970). Under the 1972 amendments cases are heard by an administrative law judge whose decisions are reviewed by the BRB, and appeals lie to the court of appeals directly from final orders of the BRB. 33 U.S.C. § 921(c).

U.S.L.W. 3645 (U.S. May 6, 1976), case we do not consider to be truly relevant, but that the issue here presented is *sub judice* in the First Circuit, *John T. Clark & Son of Boston, Inc., v. William Stockman,* No. 75-1360, argued Jan. 5, 1976, and in the Fifth Circuit. Given the importance of the question, the number of courts of appeals endeavoring to find an answer, and the divergence of opinion already manifested, it seems unlikely that the opinion of any court of appeals will be the last word to be said. In consequence we shall not dwell on the long history of the problem of affording appropriate remedies for longshoremen and harbor workers against their employers which had its inception in *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917) — a history which is interestingly traced in Gilmore & Black, The Law of Admiralty §§ 6-45 to 49 (2d ed. 1975) — but will proceed directly to the cases in hand.

I. *The 1972 Amendments*

The situation that led to adoption of the 1972 Amendments was described as follows in the portion of the Senate Report headed "Need for the Bill," S. Rep. No. 92-1125, 92d Cong., 2d Sess. 4-5 (1972):

Since 1946, due to a number of decisions by the U.S. Supreme Court, it has been possible for an injured longshoreman to avail himself of the benefits of the Longshoremen's and Harbor Workers' Compensation Act and to sue the owner of the ship on which he was working for damages as a result of his injury. The Supreme Court has ruled that such ship owner, under the doctrine of seaworthiness, was liable for damages caused by any injury regardless of fault. In addition, shipping companies generally have succeeded in recovering the damages for

which they are held liable to injured longshoremen from the stevedore on theories of express or implied warranty, thereby transferring their liability to the stevedore company, the actual employer of the longshoremen.

The social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers.

For a number of years representatives of the employees have attempted to have the benefit levels under the Act raised so that injured workers would be properly protected by the Act. At the same time, employer groups indicated their willingness to increase such payments but indicated they could do so only if the Longshoremen's and Harbor Workers' Compensation Act were to again become the exclusive remedy against the stevedore as had been intended since its passage in 1927 until modified by various Supreme Court decisions.

The bill reported by the committee meets these objections by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and "hold harmless" or indemnity agreements. It continues to allow suits against vessels or other third parties for negligence. At the same time it raises benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act.

In practical terms the bill was a trade-off. See Landon v. Lief Hoegh and Co., Inc., 521 F.2d 754, 761-62 (2 Cir. 1975), cert. denied, 96 S.Ct. 783 (1976). Stevedores and other employers were pushing for complete

abolition of the three-way damage action possible under *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85 (1946), which held longshoremen and other harbor workers to be "seamen" entitled to sue the ship for unseaworthiness, and *Ryan Stevedoring Co., Inc. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), which permitted the shipowner to seek indemnity for any liability thus entailed from an injured worker's employer. This triangle in effect exposed the employer (already liable for and often having paid the limited benefits provided by the LHWCA) to an unlimited liability to the employee for damages and to the shipowner for its counsel fees in defending the employee's suit. The unions representing longshoremen and other harbor workers which for years had been seeking increased benefits under the Act, opposed Congressional repeal of their *Sieracki*-created status as "seamen" in part on the grounds that the LHWCA's benefits were so low that workers needed the additional protection of the "unseaworthiness" doctrine. The compromise between these positions effected by the 1972 Amendments was this: The *Sieracki* action for unseaworthiness was eliminated, longshoremen in the future could sue the ship only for negligence, and employers were immunized from indemnity suits by shipowners. 33 U.S.C. § 905(b). In return, the workers were to secure increased benefits under LHWCA and, what is here pertinent, an extension of that statute's coverage. Thus the Senate Committee said that the principal purpose of the Amendments was "to upgrade the benefits, extend coverage to protect additional workers, provide a specified cause of action for damages against third parties, and to promulgate administrative reforms," Sen. Rep., *supra*, p. 1.

The change in the coverage section was dramatic.

Before amendment the first sentence of 31 U.S.C. §903 (a) read:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

The Amendments altered this to read:

> Compensation shall be payable under this chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

In place of the definition of "employee" previously contained in § 902(3) as "not includ[ing] a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net," the Amendments defined the term as follows:

> The term "employee means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master

> to load or unload or repair any small vessel under eighteen tons net.

The definition of "employer," § 902(4)

> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

was modified by inserting after "navigable waters of the United States" the expansion of that term by the parenthetical phrase in § 903.[2]

Thus, under the Amendments there are two tests for coverage under the Act: a "situs" test requiring the injury to occur on the "navigable waters" as now defined, and a "status" test which requires that the employees be "engaged in maritime employment," etc. While the situs test has been liberalized, the creation of an employee status test adds a new element to the coverage requirements.[3] The problem with which we are here concerned arises from Congress' failure to supply any definition of two terms in § 902(3)—"engaged in maritime employment" and "any longshoreman or other person engaged in longshoring operations."

II. *The Facts*

Two of the cases before us, relating to claimants Blundo and Scaffidi, concern the loading or unloading of con-

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2. The significance of this definition is that liability for compensation is predicated on being an "employer," 33 U.S.C. § 904.

3. Formerly, if an employee was not expressly excluded, as, e.g., a crew member; his injury occurring upon the navigable waters was compensable under the Act so long as his employer had "any . . . employees . . . employed in maritime employment, in whole or in part. . . ." 33 U.S.C. § 902(4) (1970).

tainers; the other two, relating to claimants Dellaventura and Caputo, involve loading of ordinary cargo into consignees' trucks on the pier.

(1) *Blundo.* Claimant Blundo was employed as a "checker" by the International Terminal Operating Co. (ITO).[4] He was injured while checking cargo being removed from a container at the 19th Street pier in Brooklyn when he walked around a draft containing cargo to mark it, slipped on some ice and fell. He was working on the stringpiece within 30 to 40 feet of the water. The container he was checking had been unloaded a few days before at a different pier and then taken by a truckman over city streets to the 19th Street pier where it was opened by the United States Customs Office and then stripped. The Administrative Law Judge (ALJ) found that the 19th Street pier was not utilized by the employer for the actual loading or unloading of vessels but rather for the storage of commodities and for the "Stripping, or stuffing, *i.e.*, loading or unloading of containers." The BRB affirmed his findings as to the employee's status and the situs of the accident and upheld a compensation award under the LHWCA.

(2) *Scaffidi.* Claimant Scaffidi was employed by Pittston Stevedoring Corp. as a "hustler" operator, a kind of trucker who moves containers within a terminal. On March 12, 1973, Scaffidi drove a hustler loaded with containers of cargo from the Columbia Street Pier in Brooklyn, New York, through some ten blocks of public streets to Pier 12. On arriving at Pier 12 he becked the container to a receiving platform on the dock in preparation for loading the container on to the ship. When the

4. A "checker" checks the contents of a container carrying goods for several consignees against the bills of lading or other records.

container was opened, a large case fell out and injured him. The BRB affirmed the findings of the ALJ on the ground that the operator of a hustler used to transport containers within a terminal is engaged in an essential step in the overall process of loading cargo aboard a vessel, which was maritime employment as contemplated in 33 U.S.C. §902(3). It found that the fact that the container had been transported over public streets was irrelevant.

(3) *Dellaventura.* Claimant Dellaventura, employed by Pittston Stevedoring Corporation as a "sorter," was injured on June 27, 1973 at Pier 20 of the Pouch Terminal on Staten Island while helping to load a truck, belonging to a consignee with coffee bags which had been offloaded from the ship *"CAMPECHE"* on or about February 16, 1973. Dellaventura slipped on some loose coffee beans while inside the truck. At times Dellaventura's responsibilities included going into the holds of ships to assist in sorting and loading or off-loading cargo. The accident occurred about 30 feet from the water's edge on the pier. The record affords no explanation for the consignee's 133-day delay in picking up the bags of coffee beans, but the ALJ found that the pier contained no warehouse facilities. The BRB affirmed his decision on the grounds set forth in *Avvento v. Hellenic Lines,* BRB No. 74-153, 1 BRBS 174, 1975 A.M.C. 153 (Nov. 12, 1974), which held that " 'until cargo is delivered to a trucker or other carrier who is to pick it up for further trans-shipment, such cargo is in maritime commerce and all employees engaged in its movement to that point are engaged in maritime employment.' "

(4) *Caputo.* Claimant Caputo was usually employed as "terminal labor" by Pittston Stevedoring Corp. When

there was no work available at Pittston, he would take a "shape up" job as a longshoreman wherever it was available and on the day of the accident was working for Northeast Marine Terminal Co., Inc. at their terminal adjoining the water in Brooklyn. He was injured while helping a cargo consignee's truckdriver load boxes of cheese, discharged from a vessel at least five days previously, inside the consignee's truck; the injury occurred while he was rolling a dolly loaded with the cheese on it into the truck. Caputo and the employer stipulated that the work he was doing when injured involved the same risk as would obtain wherever and by whomsoever trucks were loaded or unloaded with dollies. But the ALJ found the stipulation lacked significance "in view of the situs where the injury actually occurred." The ALJ made an award in his favor and the BRB concurred.

III. Motion to Dismiss Petitions in Dellaventura's Case as Untimely

Dellaventura and the Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor (OWCP), by his attorney, the Solicitor of Labor, have moved to dismiss the petitions of the employer, Pittston Stevedoring Corp., and its insurance carrier, The Home Insurance Co., as untimely. We grant Dellaventura's motion, thereby rendering it unnecessary to decide whether the Solicitor of Labor was entitled to make one.[5]

5. In the cases of Blundo and Caputo, petitioners named as a respondent the Director, Office of Workers' Compensation Programs in the Department of Labor; the petitions in Dellaventura's and Scaffidi's cases did not. The Director moved to amend the captions in the Dellaventura case, apparently for the primary purpose of enabling him to make the motion to dismiss; he made no similar motion to amend the caption in Scaffidi's case.

The issue whether the BRB should be a respondent in court of

The statute, 33 U.S.C. § 921(c), provides that a person adversely affected or aggrieved by a final order of

appeals review of its awards under 33 U.S.C. § 921(c) was treated in *McCord v. Benefits Review Board*, 514 F.2d 198 (D.C. Cir. 1975). There the BRB moved to dismiss the petition as to it. Petitioner did not oppose the motion and the court granted it, citing recent unreported decisions of the Ninth Circuit. The court reasoned that there was "sufficient adversity" between the claimant and the employer (or its insurance carrier) "to insure proper litigation without participation by the Board," that requiring the Board to participate "would parallel requiring the District Court to appear and defend its decision upon direct appeal" and that the presence of the second comma in 33 U.S.C. § 921(c) which reads:

> A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28.

indicated intention that the Board should not be a party to the appeal. There were pending motions to substitute the Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor (OWCP), as a respondent which were not before the court of appeals. In the *I.T.O.* case, *supra*, the Board moved to be dismissed as a respondent and to have the Director substituted; the court granted the first branch of the motion but denied the second, 529 F.2d at 1088-89.

With respect, we cannot subscribe to the view that Congress intended to create what to us would seem a novel form of review of federal administrative action in which no one representing the Government would be a party. See F.R. App. P. 15(a) ("In each case the agency shall be named respondent."). Prior to the 1972 Amendments judicial review took the form of a suit for an injunction in the district court against the deputy commissioner who made the order (former § 921(b)); in the absence of evidence of Congressional intent we find it hard to believe that, by providing internal review followed by an appeal to a court of appeals, Congress meant to oust the Government from further participation as of right. Appearance as an *amicus* may not be good enough, since it normally does not allow oral argument and never allows an appeal.

Neither the *McCord* nor the *I.T.O.* court discussed § 921a which provides:

> Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

The existence of sufficient adversity between private parties has not been thought to preclude the Government's right to be a party in

the BRB may obtain review by the court of appeals for the circuit where the injury occurred "by filing in such court within sixty days following the issuance of such

many other sorts of review of federal administrative action. The second comma, especially in a sentence with an inappropriate first one, seems a slender reed; the "other parties" phrase means the other parties to the BRB review but does not rule out the BRB's being a party to review in the court of appeals. While Congress did not spell matters out with the same specificity as in 28 U.S.C. § 2348, we think it sufficiently indicated its intention that the BRB and other parties to the proceeding before the BRB should be parties to a review by a court of appeals under 33 U.S.C. § 921(c); if the BRB chooses to leave the defense of its order in a particular case to the prevailing private party, it is free to do so.

The administrative regulations do not specify which branch of the agency should be represented as respondent on appeal. 20 C.F.R. § 801.402 seems to contemplate that the BRB is the proper agency respondent in court of appeals review, since it provides that "except in proceedings in the Supreme Court" the representation of the BRB is provided by the Solicitor of Labor. Moreover, § 921a quoted above seems to contemplate that the BRB be represented in court of appeals review. However, 20 C.F.R. § 801.2(a)(10) defines "party" and "party in interest" to include the "Secretary or his designee . . . ." This would indicate that the Secretary of Labor shall determine what officer represents the agency in the court of appeals. The Government's position has been that the Director, OWCP is the proper respondent. The OWCP is an administrative, not a statutory, creation. See 20 C.F.R. §§ 1.1 et. seq., and § 701.203. And the Solicitor of Labor is authorized to appear and participate on behalf of the Director, OWCP as an interested party before the BRB. 20 C.F.R. § 702.333(b). However, in the section assigning to the OWCP the responsibility for administering various programs, including the LHWCA, the OWCP is given administrative authority "except [for] 921 as it applies to the Benefits Review Board. . . ." 20 C.F.R. § 1.2(d).

Trying to make sense out of these regulations, we think that while the Director, OWCP is a proper party before the ALJ or the BRB, see cases discussed in 3 *Larson, Workmen's Compensation Laws* § 83.19, at n. 49.1 (1976 ed.), the BRB is the proper agency respondent for review in the court of appeals, although the Solicitor of Labor could be designated to represent it. We deem it best to defer resolution of this question to a case where decision on this point is essential; perhaps in the meanwhile the Department will tidy up its regulations.

Board order a written petition praying that the order be modified or set aside." The BRB's order was issued on October 9, 1975, but the petition for review was not filed until February 5, 1976.

Petitioners' basis for resisting the motion is as follows: The BRB's Rules and Regulations, 20 C.F.R. § 802.403 (b) provide that the original of any BRB decision shall be filed with the Clerk of the Board, which was done here, and that "[a] copy of the Board's decision shall be sent by certified mail or served personally on all parties to the appeal and the Director." The rule does not say when this should be done. Apparently no such notice was sent to the employer or the insurance carrier but the attorney who represented both parties before the BRB and in this court acknowledges that he received a copy within the 60-day period and does not deny that he advised his clients.

Like 28 U.S.C. § 2344 and similar provisions in the statutes for the review of orders of other agencies, 33 U.S.C. § 921(c) makes the time for seeking review start to run from the entry of the agency's order, even though the agency is under a duty to give notice. See *Willow Crossing Dairy Farm v. Hardin*, 327 F. Supp. 798 (W.D. Pa. 1970) (where review section of Agricultural Adjustment Act provided for filing of review petition within 20 days of "entry" of judgment, word "entry" is to be interpreted normally and petition filed September 28 to review order of September 2 was not timely and did not vest the court with jurisdiction even though counsel for plaintiff did not receive notice of ruling until September 8). The BRB's regulations count the 60-day period from the date on which the decision is "filed," 20 C.F.R.

§ 802.410.[6] In the parallel situation of review of judgments of district courts in civil cases Rule 4(a) of the Federal Rules of Appellate Procedure likewise makes the entry of judgment the critical date; F.R.Civ.P. 77(d) directs the clerk to serve notice of the entry of a judgment or order but expressly provides that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure," namely, "upon a showing of excusable neglect."

We see no reason not to read 33 U.S.C. § 921(c) as meaning what it says. Cf. *United States v. Michel*, 282 U.S. 656 (1931); *American Construction Co. v. United States*, 107 F.Supp. 858 (Ct. Cl. 1952), *cert. denied*, 345 U.S. 922 (1953). The policy requiring that appeals be timely taken is so strong that ministerial failures by a clerk cannot be allowed to overcome it. The Act, like many other administrative review statutes, does not seem even to encompass the "excusable neglect" escape hatch provided for untimely appeals from the district courts. But even if it should be construed as doing so, this would be a most inappropriate case for granting relief. The

6. In the only case construing the statutory provisions for mail notice to the parties of the Deputy Commissioner's decision under the old act, 33 U.S.C. § 919, the Deputy Commissioner's first order was apparently neither filed in his office nor mailed to the parties. The court held, in response to the employer's argument that a second, more generous award was barred by the first award, that the first order "did not take on the dignity of an effective award." *American Mutual Liability Ins. Co. of Boston v. Lowe*, 13 F. Supp. 906, 907 (D.N.J.) *aff'd*, 85 F.2d 625 (3 Cir. 1936). We believe this case to be wholly distinguishable particularly since both opinions rest primarily on the failure to file a *signed* order. 13 F. Supp. at 907 (citing *Howard v. Monahan*, 33 F.2d 220 (S.D. Tex. 1929)).

clerk made the pardonable error of notifying the attorney rather than the parties, exactly what a clerk of a district court is directed to do, F.R.Civ.P. 5(b) and 77(d), and the attorney offers no explanation for having failed to file the petition within the alloted time.

IV. Motion to Dismiss Petition in Scaffidi's Case As Not Presenting a Justiciable Controversy

In the proceedings up through the decision of the ALJ, the caption of this case named both Pittston and Gulf Insurance Company, its insurance carrier, as respondents; both were represented by the same attorney. After the ALJ's decision the insurance carrier paid the award and chose not to contest it further. Pittston then engaged its present attorney who altered the caption. Apparently the claimant made no point before the BRB that the carrier's payment of the award mooted the case; he does now. Despite the general rule that objections not raised before an administrative body cannot be raised on review, we must consider this one since it goes to our jurisdiction.

We see no basis on which a reversal of the BRB's decision would enable the insurance carrier to recover from Scaffidi a payment the liability for which it chose not to contest, and Pittston, which was invited to file a reply brief on the issue, does not suggest one. Cf. *Federal Insurance Co. v. Detroit Fire & Marine Insurance Co.*, 202 F. 645 (6 Cir.), *cert. denied*, 229 U.S. 620 (1913) (insurer which paid its share of loss and failed to joint other subrogated insurers in third party suit held entitled to recover ratable share of damages won). Pittston claims instead that it is nonetheless a "person adversely affected

or aggrieved" by the BRB's order, 33 U.S.C. § 921(c), since the award will adversely affect its experience rating and thus increase its future premiums. Cf. *Travelers Insurance Co. v. Belair*, 284 F. Supp. 168 (D. Mass. 1968).

Pittston's contention that this interest affords it standing immediately encounters *Gange Lumber Co. v. Rowley*, 326 U.S. 295 (1945). The Court there held that the appellant employer had failed to make a showing of substantial injury to any legally protected interest which would entitle it to question the validity under the due process clause of a state statute retroactively extending the time period in which workmen's compensation awards could be modified. Under the state's system, all awards were paid out of a state insurance fund supported by employer contributions of "premiums." Rejecting the employer's argument that its future premium rates would be adversely affected by the increased award, the Court held that the effect of any one accident was too minimal and its possible injury to the employer too speculative to establish the justiciability of the case.[7]

The *Gange* decision, however, has been severely criticized by Professor Davis. He notes that under the state statute the employer was permitted to appeal, and characterizes the result as "unique," "the extreme one of denying the employer's standing even though the statute conferred such standing." 3 *Davis, Administrative Law Treatise*, § 22.13, n. 4 (1958). It may well be that under the

7. *Gange Lumber Co.* was followed in *Railway Express Agency v. Kennedy*, 189 F.2d 801 (7 Cir.), *cert. denied*, 342 U.S. 830 (1951) (denying employer standing to challenge unemployment compensation payments to striking workers from federal fund). Cf. 2A *Larson, Workmen's Compensation Law* § 77.30 (1976 ed.) (damage action by employer against negligent third party for increased premiums would lie).

more liberal concepts of standing developed in such cases as *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and *Barlow v. Collins*, 397 U.S. 159 (1970), *Gange Lumber Co.* would not be followed. However, even on the standing issue alone, an overruling of *Gange Lumber Co.* would hardly carry the day for Pittston on this record where it has submitted nothing but conclusory assertions of adverse effect on future premiums.[8]

However all this may be, the liberalization of notions as to what makes a person "adversely affected or aggrieved" does not eleminate the requirement that in order for a controversy to be justiciable, the court must be able to afford effective relief. See *Simon v. Eastern Kentucky Welfare Rights Org.*, __U.S.__, 44 U.S.L.W. 4724 (June 1, 1976); *Warth v. Seldin*, 422 U.S. 499, 504-05 (1975); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *Local No. 8-6, Oil, Chemical & Atomic Workers Internat'l Union, AFL-CIO v. Missouri*, 361 U.S. 363, 367 (1960); *St. Pierre v. United States*, 319 U.S. 41, 42 (1943); *McKee v. Turner*, 491 F.2d 1106 (9 Cir. 1974). As indicated, Pittston has not claimed that Scaffidi will not retain his award even if we should reverse the BRB; what it is asking is simply an advisory opinion that the award should not have been made.[9] We do not doubt that where insurance only partially covers the liability, the employer

8. There is no proof that payment of this one award would affect the premiums of such a large employer as Pittston. Moreover, we are not told whether the arrangements between Pittston and its insurance carrier allow the latter to take advantage of an award made without Pittston's consent in determining Pittston's ratings and, if so, whether a reversal by us would change matters.

9. *Jaabeck v. Theodore A. Crane's Sons Co.*, 238 N.Y. 314, 318 (1924), cited by the petitioner in its reply brief, is wholly inapposite. A state workmen's compensation board had entered an award against

may appeal from a judgment even though the insurer has paid its part. See *Moore v. Columbia Casualty Co.*, 174 F. Supp. 566 (S.D. Ill. 1959); *Queen Ins. Co. of America v. Meyer Milling Co.*, 43 F.2d 885 (8 Cir. 1930). But where the issue of liability is determined against an insured and its insurer, and the insurer pays the damages in full even without the consent of the insured and chooses not to appeal, the insured cannot appeal from the judgment against him. *Ross v. Stricker*, 153 Ohio St. 153, 91 N.E. 2d 18 (1950), discussed in 19 *Couch on Insurance* 2d § 78.228. In short, as the Supreme Court has said, albeit in a different context, once an insurer "has paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name." *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 380-81 (1949); *Link Aviation, Inc. v. Downs*, 325 F.2d 613 (D.C. Cir. 1963). See also *Zauderer v. Continental Casualty Co.*, 140 F.2d 211 (2 Cir. 1944). This seems a reasonable application of the general rule that a party who has no interest in a fund cannot appeal from an order disbursing the fund. *Seaboard Surety Co. v. United Sates*, 306 F.2d 855 (9 Cir. 1962), and cases cited at 306 F.2d at 859, n.6. We therefore dismiss Pittston's petition.[10]

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both the employer and its insurer, one of the questions determined by the board being that of the insurer's liability under the insurance contract. The Appellate Division affirmed the award as to the employer but reversed as to the insurer on the ground that the policy did not cover the risk. The employer appealed to the Court of Appeals, which reversed the Appellate Division with respect to the insurer, affirming in full the order of the State Industrial Board. The employer was clearly aggrieved by the order of the Appellate Division and the Court of Appeals gave effective relief by reinstating the order of the State Industrial Board.

10. An additional reason for this conclusion is that once the insurance carrier has paid, without preserving its right to recover the payment by taking an appeal, the case lacks the necessary quality of adversariness. We see no reason why a person in Scaffidi's position should bother to defend against a petition to review or why the BRB or the Director should spend the Government's resources in such a case, even though that was done here.

V. Interpretation of the Statute

With these preliminaries out of the way, we can now undertake our main task—the interpretation of the coverage clauses of the 1972 Amendments.

Admitting as they must that the Amendments worked some extension of coverage, petitioners and the National Association of Stevedores (NAS), as *amicus curiae*, would limit this to factual situations generally comparable to those in *Nacirema Operating Co., Inc. v. Johnson*, 396 U.S. 212 (1969). There the Court held that the Act, as it then stood did not cover longshoremen killed or injured on a pier while attaching cargo from railroad cars to ships' cranes for removal to the ships, although coverage presumably would have existed had they been hurled into the water, *Marine Stevedoring Corp. v. Oosting*, 238 F. Supp. 78 (E.D. Va. 1965), *aff'd*, 398 F.2d 900 (4 Cir. 1968) (en banc),[11] or injured on deck while

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11. *Nacirema Operating Co., Inc., supra*, reversed the *en banc* decision of the Fourth Circuit in *Marine Stevedoring Corp., supra*. Four cases were before the court of appeals in the consolidated appeal; in only three cases were petitions for certiorari filed and granted. Those three cases involved employees injured on the pier as described above whom the Deputy Commissioner had ruled were *not* covered by the LHWCA. The district courts had affirmed the Deputy Commissioners' denial of awards, and were reversed by the Fourt Circuit. In the fourth case (the title case in the court of appeals), the employee, also on the pier, had been injured while lifting a cable off the stern bollard of a vessel when it suddenly straightened, catapulting him into a river where he drowned. The Deputy Commissioner had found that the employee was covered under the Act, his award was affirmed by the district court and by the court of appeals, and it was not before the Supreme Court in *Nacirema*. Mr. Justice Douglas noted in his dissent that "[i]t is

performing part of the same operation, *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962). Resting its decision solely on statutory grounds, the Court said that "[t]he invitation to move" the line dividing the coverage of LHWCA "landward must be addressed to Congress, not to this Court," 396 U.S. at 224. Petitioners argue that the BRB's rationale in effect reads the "status" requirement out of the Act by affording coverage to any longshoreman injured on a pier no matter what he is actually doing when injured.

The respondent employees, the International Longshoremen's Association (ILA), as *amicus curiae*, and the Solicitor of Labor (see note 5, *supra*) contend that the extension was much more substantial. Their position is that the process of unloading a vessel continues until the cargo is deposited on the consignee's truck on the pier (or begins, in the case of loading, when the goods are being removed from the delivery truck), and that anyone physically participating in this process is engaged in "maritime employment." We disagree with petitioners, without having to decide whether we would go to the full extent urged by their adversaries.

A.

We begin our analysis by remarking on the unsatisfactory state of the records before us, even if we include for this purpose the two petitions which we have dismissed. When cases of this nature began coming to the BRB shortly after the enactment of the Amendments, it should have realized that it was faced with a major

incongrous . . .that in an accident on a pier over navigable waters coverage of the Act depends on where the body falls after the accident has happened." 396 U.S. at 225.

task of statutory construction in determining what constitutes "maritime employment" or being a "longshoreman or other person engaged in longshoring operations"—which task could be performed satisfactorily only in the light of an extensive factual background detailing the structure of work on the various piers of this country. The following are illustrative of facts we would like to know but on which these records shed little or no light, even as regards the port of New York, let alone the rest of the nation. Does one gang normally take cargo off or on the ship while another is responsible for transportation beyond the "point of rest"? Does the same gang always, sometimes, or often perform both jobs? Is all work on the pier normally conducted by a single employer or is there a division between the stevedore and the "terminal operator"? Even if there is only one employer, does he segregate the employees in their work assignments, by having different collective bargaining agreements or otherwise? Are separate charges made for services beyond the "point of rest" and, if so, for what? Does the "point of rest" shift about on the same pier? Just what is the normal practice for stripping and stuffing containers with goods belonging to different owners or destined to different consignees? Is this work normally done on the pier or in warehouses not adjoining navigable waters? What determines the choices? Does the hazardous nature of the employment stop at the point of rest or continue so long as the cargo is on the pier? Do the hazards change in frequency or degree as the longshoreman moves away from the water? The consolidation of several cases presenting different factual situations in a single large proceeding might have enabled the BRB to make meaningful distinctions. Instead

of developing such a record and laying down guidelines for the ALJ's, the BRB has handled each case on an individual basis,[12] and without establishing any record support for the interpretative rules announced therein.

If we were sitting as a court of last resort, we would remand these cases to the BRB on our motion with directions to cause such a hearing to be held. But with the cases in their present posture in this circuit and others, we think it more helpful for us to state our views on what is now before us.[13]

B.

Perhaps the most useful way to approach the issue is to begin by discussing certain arguments we have not found to be particularly helpful.

(1) *The "presumption" of coverage,* 33 U.S.C. § 920. The claimants, the Solicitor of Labor, and the ILA place great reliance on a provision in the LHWCA as originally adopted in 1927; 33 U.S.C. § 920, and still in effect, that four things shall be presumed in the absence of substantial evidence to the contrary. One of these is "[t]hat the claim comes within the provisions of this chapter." 33 U.S.C. § 920(a). They contend that if the meaning of the new coverage provision, 33 U.S.C. § 903,

12. We were told at argument that in the *I.T.O.* case the NAS tendered to the BRB a "Brandeis brief" intended to give the BRB some of the general information we have mentioned, outlining the division of labor in 45 ports in the United States; that the tender was rejected on the objection of the Solicitor on behalf of the Director, OWCP; but that the document was discussed at oral argument in the Fourth Circuit and has been referred to in other decisions of the BRB. We have not had even that much assistance.

13. If one or more of the other circuits seized of this problem should order such a remand, we would entertain a petition for rehearing to enable us to do the same.

is in any way doubtful, this presumption requires the doubt to be resolved in favor of coverage. We do not think this was what Congress had in mind; the very fact that the presumption can be overcome by substantial contrary evidence indicates its inapplicability to an interpretative question of general import such as this. See *Crowell v. Benson,* 285 U.S. 22, 64-65 (1932).

Even in cases holding that the accordion-like phrase "arising out of and in the course of employment," 33 U.S.C. § 902(2), could be widely stretched, the Court has done little more than mention the presumption, *Cardillo v. Liberty Mutual Ins. Co.,* 330 U.S. 469, 474 (1947): *O'Keefe v. Smith, Hinchman & Grylis Associates, Inc.,* 380 U.S. 359, 361 (1965) (per curiam), resting its decision mainly on the principle with respect to the scope of review discussed below. In *O'Leary v. Brown-Pacific-Maxon, Inc.,* 340 U.S. 504 (1951), the Court did not rely on the presumption at all, even in the face of a strong dissent. The Court's decisions dealing with questions of coverage of the sort presented here will be searched in vain for any mention of the presumption, see, e.g., *Parker v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Norton v. Warner Co.,* 321 U.S. 565 (1944); *Calbeck v. Travelers Ins. Co., supra,* 370 U.S. 114 (1962); *Nacirema Operating Co., Inc. v. Johnson, supra,* 396 U.S. 224 (1969),[14] although in *Norton* and *Nacirema* coverage was rejected. The cases in this court, *Michigan Mutual Liability Co. v. Arrien,* 344 F.2d 640, 645-46

14. In *Davis v. Department of Labor,* 317 U.S. 249, 256 (1942), the Court noted that with respect to the largely "factual questions" relating to whether an employee injured within the "twilight zone" of federal jurisdiction established by the Court should be compensated under state or federal law, "presumptive weight" should be given to the findings of the federal or state administrator of the respective program, and relied in part on § 920(a).

(2 Cir.), *cert. denied,* 382 U.S. 835 (1965), and *Overseas African Construction Corp. v. McMullen,* 500 F.2d 1291, 1296 (2 Cir. 1974), likewise treat the presumption as merely an embodiment of the "rule . . . that so long as any reasonable inference from the facts supports jurisdiction under the statutory presumption that jurisdiction may be found." 500 F.2d at 1296. Here the question is not whether a line established by Congress is sufficiently elastic to include the claimant; the main issue is whether Congress placed the line at the "point of rest" or much further landward. Only if we have made the latter basic decision might the presumption come into play in ruling on cases near the border. See *Davis v. Department of Labor,* 317 U.S. 249 (19).

(2) *"Deference" to the BRB.* We likewise see no merit in the contention of claimants and the Solicitor of Labor that we are confined in our decision because of the deference owed to the BRB. We agree that the standard of review we must apply is that factual findings of the BRB are conclusive if supported by substantial evidence in the record considered as a whole since, as held in *Potenza v. United Terminals, Inc.,* 524 F.2d 1136 (2 Cir. 1975), it is of no moment that 33 U.S.C. § 921(b)(3) while applying this standard to the BRB's review of the ALJ's findings of fact does not expressly extend it to review in the court of appeals. But we are still confronted with the ever troubling question whether the determination at issue, namely, whether the 1972 Amendments should be so interpreted as to include these claimants, is the kind of question which justifies or requires judicial deference.

We think it is time to recognize, in line with Professor Kenneth Culp Davis' brilliant discussion, 4 Administrative

Law Treatise §§ 30.01-.09 and the corresponding sections in the 1970 Supplement, that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand.[15] Leading cases supporting the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if without rational basis are *Rochester Telephone Corp. v. United States,* 307 U.S. 125, 146 (1939); *Gray v. Powell,* 314 U.S. 402, 411-12 (1941); and *NLRB v. Hearst Publications, Inc.,* 322 U.S. 111, 130-31 (1944). The rationale of these decisions was applied in the three "arising out of and in the course of employment" Supreme Court cases under the LHWCA—*Cardillo, O'Leary* and *O'Keefe,* cited above. Indeed, the Court seems to have rejected the findings of the LHWCA's Deputy Commissioners only once since the statute was enacted, *Norton v. Warner Co., supra,* 321 U.S. 565. However, there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term.

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15. Our discussion of the Court's ambivalence with respect to deference is not to be read as dealing with two problems quite different from that here presented. One concerns an agency's exercise of power to formulate substantive rules, where the scope is wide, see, e.g., *American Telephone & Telegraph Co. v. United States,* 299 U.S. 232 (1936); *Addison v. Holly Hill Fruit Products, Inc.,* 322 U.S. 607 (1944), and the rules once issued, even if only in the form of guidelines, are "entitled to great deference", *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-34 (1971); *Albomarle Paper Co. v. Moody,* 422 U.S. 405, 430-36 (1975). The other concerns an agency's construction of its own rules, see, e.g., *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 413-14 (1945); *Udall v. Tallman,* 380 U.S. 1, 16-17 (1965); *TSO Industries, Inc. v. Northway, Inc.,* ____U.S.____, ____ n. 10 (1976), 44 L.W. 4852, 4855 n. 10 (1976).

Illustrative cases are *Office Employees International Union, Local No. 11, AFL-CIO v. NLRB*, 353 U.S. 313 (1957), and *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 150 (1944). In one of its most recent decisions on the subject, *Morton v. Ruiz*, 415 U.S. 199, 237 (1974), the Court held that "In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose"; this very nearly eliminates the "deference" principle as regards statutory construction altogether since if the agency's determination is found by a court to be consistent with the congressional purpose, it presumably would be affirmed on that ground without any need for deference.

There are several other reasons not to rest decision on the "deference" approach in these cases. One is that unlike the F.C.C. in the *Rochester Telephone* case, the Bituminous Coal Division of the Department of the Interior in *Gray v. Powell*, or the NLRB in the *Hearst* case, the BRB is not a policy making but entirely an umpiring agency. When Congress has charged an agency with the duty to make and implement a national policy, it is more likely that Congress intended the agency to have some flexibility, free from judicial intrusion, in interpreting the Congressional grant. Compare *Rochester Telephone Corp. v. United States, supra*, 307 U.S. at 146; *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1963). A second factor is the way in which the agency has gone about its job. As suggested above, we would be much more inclined to defer to a considered judgment of the BRB rendered on a full record than to this series of short opinions on isolated facts which contain no in-depth study of the problem. A somewhat related point is that although the BRB's decisions have been "consistent and contemporaneous," the issue arose almost

immediately after the 1972 Amendments became effective at a time when the BRB had little experience in the administration of the Act; yet its initial decisions, surely not the result of any great expertise, became the basis for all the others. "[A]n agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973). Finally, this is a case where understanding of the statute depends in no small measure on prior judicial decisions and legislative history—subjects on which a court has a greater competence than the BRB. We therefore reject the argument that the BRB's decisions in these cases must be affirmed if they are rational but wrong.

(3) *Other definitions.* We likewise give little weight to arguments made on both sides which are based on definitions of "longshoreman" or maritime employment or contracts formulated in different contexts and for different purposes. The ILA relies on Congress' approval, Act of Aug. 12, 1953, ch. 407, 67 Stat. 541, of definitions (reproduced in the margin)[16] in a compact between New

16. See ILA Amicus brief at 5-6 n. 1. The definitions in the Bi-State Compact can be found at § 9806 of McKinney's Unconsolidated New York Laws and § 32:23-6 of N.J.S.A.

"Pier" shall include any wharf, pier, dock or quay.

"Other waterfront terminal" shall include any warehouse, depot or other terminal (other than a pier) which is located within one thousand yards of any pier in the Port of New York district and which is used for waterborne freight in whole or substantial part.

"Longshoreman" shall mean a natural person, other than a hiring agent, who is employed for work at a pier or other waterfront terminal, either by a carrier of freight by water or by a stevedore

(a) physically to move waterborne freight on vessels berthed at piers, on piers or at other waterfront terminals, or

(b) to engage in direct and immediate checking of any such

York and New Jersey creating the bi-state Waterfront Commission. To assume that the 1972 Congress had in mind this action of its predecessor of 1953 is to attribute a degree of acumen few Congressmen would claim. Beyond that, the purposes of the two enactments were quite different; it is for that reason that paragraph of the Waterfront Commission Act includes persons, notably clerical workers, clearly not embraced under the most liberal construction of the 1972 Amendments.

On the other hand, a narrow definition of "longshoring operations"[17] formulated by the Secretary of Labor in 1960 as part of safety regulations issued in respect of "all employments covered by this chapter," 33 U.S.C. § 941(a), is likewise not dispositive of the meaning of the words used in the Amendments since under the old statute covered employment was limited to injuries occurring "upon the navigable waters of the United States (including [only] any drydock)." And despite the definition of "carriage of goods" as covering "the period from the time when the goods are loaded on to the time when they are discharged from the ship" contained in the Carriage of Goods by Sea Act (COGSA), 46 U.S.C.

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freight or of the custodial accounting therefor or in the recording or tabulation of the hours worked at piers or other waterfront terminals by natural persons employed by carriers of freight by water or stevedores . . . .

"Stevedore" shall mean a contractor (not including an employee) engaged for compensation pursuant to a contract or arrangement with a carrier of freight by water, in moving waterborne freight carried or consigned for carriage by such carrier on vessels of such carrier berthed at piers, on piers at which such vessels are berthed or at other waterfront terminals.

17. * * * the loading, unloading, moving or handling of cargo, ships stores, gear, etc., into, in, on, or out of any vessel on the navigable waters of the United States.
25 Fed. Reg. 1566 (1960), 29 C.F.R. 9.3(i).

§ 1301(e), we have held that the contract of carriage, obviously a maritime contract, persists after unloading and that the carrier remains liable, not as a carrier but as a bailee, until it delivers the cargo to the consignee or places it in a public dock or warehouse. *David Crystal, Inc. v. Cunard Steamship Co.*, 339 F.2d 295, 298 (2 Cir. 1964), *cert. denied*, 380 U.S. 976 (1965); *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 811-12 (2 Cir. 1971); *Cameco, Inc. v. S.S. American Legion Lines*, 514 F.2d 1291, 1295-96 (2 Cir. 1974).

(4) *Liberal construction of remedial legislation.* There is more force in the contention of the claimants and the Solicitor that a broad reading of the 1972 Amendments is required by the oft-iterated principle that remedial legislation should be construed liberally. The Supreme Court said, as to this very statute, although in a quite different context, *Voris v. Eikel*, 346 U.S. 328, 333 (1953):

> This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.

Petitioners do not altogether overcome this point by arguing that a statute must be construed with reference to the mischief intended to be overcome, see *Heydon's Case*, 3 Co. Rep. 7a, 76 Eng. Rep. 637 (1584), and that all that Congress intended to "remedy" was the unjust result of *Nacirema Operating Co. v. Johnson, supra*, 396 U.S. 212, by accepting the invitation which, pursuant to Mr. Justice White's suggestion, the unions extended to it.[18]

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18. The argument, in fact, flounders on a number of points. The invitation issued in *Nacirema* was broadly phrased:

There is much to be said for uniform treatment of longshoremen

The statutory language can fairly be read to do more than that and thus the liberality principle tends in favor of such a reading.

C.

With this background we address ourselves, at long last, to the words of the statute with the aid of the legislative history. There is no question that claimants met the situs test of § 903(a),[19] and concededly all worked

injured while loading or unloading a ship. But even construing the Extension Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act. And construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court.

396 U.S. at 223-24. The Court contemplated at least two possibilities: an extension of the LHWCA to cover longshoremen injured on a pier "while loading or unloading a ship," or an extension to "coincide with the limits of admiralty jurisdiction." In the absence of clarifying legislative history, we would have no idea which set of evils referred to in *Nacirema* Congress was endeavoring to overcome.

19. In the Blundo case the petitioner, I.T.O. makes a half-hearted argument that Blundo was not injured on the navigable waters within the expanded definition because the 19th Street pier on which he was injured was not used for the loading or unloading of vessels. This argument flies in the face of the statute, which reads ". . . including *any* adjoining pier . . . *or other adjoining area* customarily used by an employer in loading, unloading, repairing or building a vessel." (Emphasis added.) It would seem that any pier next to the water is included within the situs definition. Accord, *I.T.O. Corp. of Baltimore v. Adkins, supra,* 529 F.2d at 1083-84. The testimony before the ALJ established that Blundo was injured

for covered "employers" under the Act; the question is whether each—now Blundo and Caputo—was a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . . ." § 902(3)[20]

If there were any doubt on the face of the statute the legislative history makes clear that § 902(3), as here relevant, is to be construed no differently than if it said "any longshoreman or other person engaged in longshoring activity or engaged in other maritime employment." Cf. *Argosy Limited v. Hennigan,* 404 F.2d 14, 20 (5 Cir. 1968); *United States v. Gertz,* 249 F.2d 662, 666 (9 Cir. 1957). The Senate Committee on Labor & Public Welfare stated, Sen. Rep. No. 92-1125, 92d Cong. 2d Sess., at 13:

> It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a

at one of two "finger" piers which jutted into the water from the terminal. The entire terminal adjoined the water and was enclosed by a single gate. The finger pier at 21st Street was used for vessels; the finger pier at 19th Street was used to load and unload containers. Blundo was clearly on a "pier" and a "terminal" adjoining the water, a part of which was used for loading and unloading vessels. This is sufficient.

20. Judge Craven, dissenting from the panel opinion in *I.T.O.*, advanced the argument, although he did not base his conclusion on it, that this phrasing might make the inquiry too narrow, since § 902(3) also includes "any harborworker," 529 F.2d at 1090 n. 3. He cited the statement in 1 *Norris, The Law of Maritime Personal Injuries* § 3 (3d ed. 1975), that the longshoreman is only "[f]irst in the catalogue of harbor workers." Arguably, however, Congress intended "harbor workers" to refer only to persons similar to those specifically described ("any harborworker including a ship repairman, shipbuilder, and shipbreaker") and not to persons concerned with the movement of cargo. But see Norris, *supra,* § 5. Like Judge Craven we find it unnecessary to decide the point.

permanently disabled longshoreman, depending on which side of the water's edge the acident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The House Committee Report, No. 92-1441, 92d Cong. 2d Sess. contained identical language.

Secondly, and more important, Congress perceived a need to provide expressly for coverage for "any longshoreman" in addition to what it had established for a person engaged in "longshoring operations." A "longshoreman" may thus be covered at some times even when he is not engaged in traditional longshoring activity. This alone is sufficient to condemn the "point of rest" doctrine. Petitioners concede that persons engaged in moving unloaded cargo to its first point of rest or moving cargo to be loaded from its last point of rest are engaged in "longshoring

operations." If they alone were to be covered, there was no need to provide also for "any longshoreman."

What then did Congress mean by that phrase? Obviously it is not enough that a claimant calls himself a longshoreman or that a longshoremen's union in a particular port has forced employers to hire its members for such unlongshoreman-like positions as clerks or guards. But see *Weyerhaeuser v. Gilmore, supra,* 528 F.2d at 962.

The reports of the Senate and House committees go a long way toward supplying an answer. Immediately after the two paragraphs quoted above came the following:

> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals

who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

Two conclusions emerge from this with seeming certainty: One is that Congress was concerned about "the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels," new facts of life on the waterfront which, as this court noted in *Intercontinental Container Transport Corp.* v. New York Shipping Ass'n, 426 F. 884, 886 (2 Cir. 1970), mean that a good deal more of the longshoreman's traditional jobs are now performed on shore. Stripping a container of goods destined to different consignees is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship even though it is performed on shore and not in the ship's cargo holds. Congress intended to cover men engaged in these activities if they met the situs test contained in the Act — irrespective of the employee's position vis-a-vis a "point of rest." The committees said expressly that "checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment." Congress did not say they were covered only if they unloaded the container at the spot where a crane had first deposited the container or loaded it at a place on the water's edge; one of the advantages of container is that they permit loading or unloading to be done at less congested locations. It sufficed for coverage if an accident arising from the stripping or stuffing of containers occurs at a place within the situs

test. One answer to petitioners argument that stuffing or stripping a container on a pier is no different from doing the same job a mile away is that Congress may have doubted its power, under the admiralty clause of Article III, to go further than it did. This would decide Blundo's case if he had been "checking" the container at the pier where it was first deposited even if it had been moved several times. We fail to perceive any significant difference because, for the convenience of someone, it had been moved to another pier. The cargo had not yet been delivered to the consignee; the unloading process still had not been completed.[21]

The second conclusion is that Congress was concerned with providing uniformity of coverage for persons engaged in the loading or unloading functions on the piers. It wished to minimize the occasions when longshoremen and other harbor workers would be walking from the liberalized benefits of LHWCA to the much lower ones provided by state compensation laws.[22] Peti-

21. As many admiralty cases have decided, in construing other doctrines of maritime law, a realistic view of the loading or unloading process recognizes that it does not stop as soon as the cargo first hits the pier on being removed from a vessel, nor does it begin only when the cargo stands on the pier next to the vessel on which it is about to be loaded. See *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 214 at n. 14 (1971), *rev'g on other grounds Law v. Victory Carriers, Inc.*, 432 F.2d 376 (5 Cir. 1970). Frequently large gangs of longshoremen, dozens of men, are assigned different tasks in a continuous process which moves cargo off a vessel ultimately to a warehouse or storage area at the far end of the pier or terminal. *Garrett v. Gutzeit*, 491 F.2d 228 (4 Cir. 1974).

22. Joseph Leonard, Safety Director of the ILA, in speaking to the House Committee about the former coverage provisions, asked, "What do we do, cut ourselves in half?" Hearings on H.R. 247, H.R. 3505, H.R. 12006, and H.R. 15023 (Longshoremen's & Harbor Workers' Compensation Act Amendments of 1972), before the Select Subcomm. on Labor of the House Comm. on Educ. & Labor, 92d Cong., 2d Sess., 297.

tioners argue that Congress was concerned with providing uniformity only in the *Nacirema* situation, where the same employee engaged in the same unloading or loading operation would have been protected by the federal statute if a draft of cargo hit him while he was on the ship but not if his injury occurred on the pier itself, and point to the fact that the illustration used by the committees was a case where cargo is "unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters." But the committees stated their intention more broadly — "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." The concern for uniformity was not limited to rectifying the disparity between the longshoreman making up the draft on the ship and the longshoreman receiving it on the pier; it extended to the disparity that would result if a line were drawn between the latter and a longshoreman, perhaps the very same one, who moved the unloaded cargo to another place on the pier.[23] The committees' language clearly is broad enough to cover a person like Caputo who spent a significant part of his time in working on vessels, so long as he did not come within the category mentioned as being excluded — employees who are not engaged in loading or unloading a vessel, "[t]hus, employees whose responsibility is only to pick up stored cargo for further trans-shipment."

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23. Congress also expressed interest in extending federal coverage to as many longshoremen as possible to avoid the "disparity in benefits payable . . . for the same type of injury depending on . . . in which State the accident occurs." Senate Committee Report, *supra*, at 12.

Petitioner asserts that Caputo came within both descriptions of excluded persons. Clearly he did not come within the second. His responsibility was to perform a variety of jobs on the pier, on both sides of the "point of rest", including going on vessels. Also we would not regard the cargo as "stored" within the committees' meaning simply because the consignees had delayed five days in picking it up.[24] The question whether he was engaged in loading or unloading (here unloading) is closer. If his injury had occurred while he was moving the boxes of cheese from a previous position on the pier to the consignee's trucks, he clearly would have been engaged in "unloading," in the way that term is used in ordinary speech. That being so, it would be wholly artificial to draw a distinction because his injury occurred while he was inside the consignee's truck. See note 21, *supra*. To be sure, the carrier would probably have fulfilled its legal duty if it had instructed the stevedores simply to place cargo alongside consignee's trucks and leave the loading of the trucks to them. But, so far as we can gather from this meagre record, that is not the life of the waterfront. The driver needs help in loading or unloading his truck, it would be uneconomical for him to carry a sufficient supply of helpers, everyone wants the truck off the pier as soon as possible, so the stevedores have their employees lend a hand. It is not clear whether an additional charge is collected for this, but we do not think it matters. Neither do we think it matters that the stevedore might not be liable for mishandling by a longshoreman within the truck.

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24. We thus are not required to decide whether cargo should ever be regarded as "stored" so long as it remains on the pier in the custody of the stevedore employed by the vessel rather than being placed in a public warehouse. Dellaventura's case, where there was a delay of 133 days, might have demanded such a decision.

Petitioners make a significant argument that the high benefits under the Amendments were provided because of the extremely hazardous nature of longshoring and that these extraordinary hazards no longer exist once the cargo is beyond the "point of rest." Indeed, in Caputo's case the parties stipulated that what Caputo was doing was the same, and entailed the same risk of injury, as exists wherever and by whomsoever trucks are loaded or unloaded with dollies. The Senate Report, p. 2, refers to "high-risk occupations such as those covered by this Act" and says that "[l]ongshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations." What we do not know is what types of operations were considered to be longshoring for the purpose of these calculations. Also, as shown by the case of Blundo who slipped on ice while he was checking the contents of a container that was being stripped on a pier other than the one where the vessel was unloaded, unusual hazards can exist due to the exposure of piers to the elements which would not exist in a manufacturing plant or in a garage or warehouse where containers removed from trucks were being stripped. Doubtless the hazards of longshoring vary with the particular tasks being performed, and may in some instances be no greater than those encountered by persons doing similar work in places other than piers or terminals adjoining the water's edge.[25] However all this may be, we find nothing in the words of the statute or its legislative history that would enable us to construct a "hazard" test; Congress' intention was rather to provide

25. But see the statement of Representative Hicks of Massachusetts on the floor of the House. 118 Cong. Rec. 36387 (Oct. 14, 1972). And see House Hearings, supra note 22, at 288-89 (statement of Patrick Tobin, Internat'l Longshoremen's .and Warehousemen's Union (ILWU)).

uniformity of coverage for workers injured while engaged in the process of loading or unloading ships who met the situs test. We note in this connection that the increased benefits inure to shipbuilders meeting the situs test, although much of their work is performed in facilities no more hazardous than those not within the expanded definition of "navigable waters" and that the benefit schedules of LHWCA apply to all industrial accidents in the District of Columbia, Act of May 17, 1928, ch. 612, 45 Stat. 600 (1928), 36 D.C. Code § 501 (1973).

In a variation of the argument last considered, petitioners contend that because of the higher benefits payable under LHWCA than under state compensation acts, construing the Amendments to apply beyond the point of rest will increase the already high expenses of stevedores to an extent that Congress could not have intended. Clearly, as explained at the outset, the act was a trade-off—a gain to the stevedores in doing away with the Sieracki-Ryan triangle, a gain to the workers in higher benefits and in moving the *Jensen* line shoreward. Just how much added cost Congress meant to impose on stevedores by the second part of the bargain is impossible to determine.[26] What is clear is that Congress had a profound distaste for a regime in which employees engaged in the rough and tumble work

26. It is worth noting that the increased benefits provided by the Amendments followed recommendations of the National Commission on State Workmen's Compensation Laws (Sen. Rep., p. 4), and that Congress may well have expected that enactment of the Amendments would have an effect on state compensation laws. Hearings on S. 2318, S. 525, and S. 1547 (Longshoremen's & Harbor Worker's Compensation Act Amendments of 1972) before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 92d Cong., 2d Sess., at 74 (statement of James O'Brien, Ass't Dir. Soc'l Sec. Dep't, AFL-CIO), 149 (statement of Joseph Leonard, Safety Director, ILA).

described in the Amendments should be covered under the Federal Act at one moment and under state acts at another.

We therefore hold that the Amendments at least cover all persons meeting the situs requirements (1) who are engaged in the stripping or stuffing containers or (2) are engaged in the handling of cargo up to the point where the consignee has actually begun its movement from the pier (or in the case of loading, from the time when the consignee has stopped his vehicle at the pier), provided in the latter instances that the employee has spent a significant part of his time in the typical longshoring activiy of taking cargo on or off a vessel. That is as far as we need to go to affirm Blundo's and Caputo's awards; whether the proviso is essential can be left for another day.

Petitioners say, as indicated above, that in effect our construction reads the status requirement out of the Act. We concede it goes some way in that direction. But it does not do so completely; we part company with Gilmore & Black when they assert that the committee reports should be disregarded and the Amendments then "can fairly be read to cover all employment-related injuries which occur within the Act's territorial limits." The Law of Admiralty, § 6.51 at 430 (1975).[27] We believe our position avoids some of the more problematic possibilities lurking in the new "status" requirement, and accords with the liberal interpretation which must be

27. They add that "a female secretary who works in a terminal warehouse should qualify as a LHCA harbor worker in exactly the same way that a female hairdresser in a cruise ship's beauty salon qualifies as a Jones Act seaman." *Id.* We do not find the analogy persuasive. Cruise ships encounter rough weather and may even sink; terminal warehouses don't. Cf. *Malramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2 Cir. 1973).

given this remedial statute and its remedial amendments. See Comment, Broadened Coverage Under the LHWCA, 33 La. L. Rev. 683, 693 (1973).

VI. Constitutionality

In so construing the Amendments we have necessarily assumed that the construction would be constitutional. We think that assumption is well founded.

It is beyond dispute that "Although containing no express grant of legislative power over the substantive law, the provision [of Article III as to admiralty and maritime jurisdiction] was regarded from the beginning as implicitly investing such power in the United States." *Panama R.R. Co.* v. *Johnson*, 264 U.S. 375, 386 (1924). The classic definition of the jurisdiction was Mr. Justice Story's in *DeLovio* v. *Boit*, 7 Ped. Cas. 418, 444, Case No. 3776 (C.C.D. Mass. 1815 that it "comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality the former extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea." Mr. Justice Story used the broad term "locality" in his definition of the jurisdiction with respect to "torts, and injuries." Although the Supreme Court later defined locality as including only injuries suffered on navigable waters and not injuries on the land caused by a vessel, *The Plymouth*, 70 U.S. (3 Wall.) 20 (1866), the Court has acquiesced in Congress' overruling that holding by the Admiralty Extension Act, 46 U.S.C. § 740, which was applied without question in *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206 (1963). See also *United States* v. *Matson Navigation Co.*,

201 F. 2d 610 (9 Cir. 1953), cited with approval in *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 209 n.9 (1971), in which the Court stated that "if denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Arts. I and III of the Constitution to enact a suitable solution." *Id.* at 216.[28] Most important of all are the statements in *Nacirema, supra,* 396 U.S. at 223, that "There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship," and the suggestion that Congress be invited to do something about this, *id.* at 397. The Court would scarcely have suggested this if it had entertained doubt as to the constitutionality of a Congressional response.

We thus see no reason to question the power of Congress to expand the concept of a maritime tort to include injuries suffered by persons on structures adjoining navigable waters in the course of employment related to ships. If we were more doubtful on the point than we are, we would see no reason why the extension of coverage could not be predicated on the portion of the jurisdiction relating to maritime contracts, where there is no "locality" test. Contracts of employment relating to maritime matters are within that jurisdiction, *Sheppard* v.*Taylor,* 30 U.S. (5 Pet.) 675 (1831), and claims under LHWCA are by an employee engaged in "maritime employment" against an employer.

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28. The Court has also sustained the Jones Act, which accords to seamen a remedy for injuries on land as well as on the sea, as an extension of the remedy of maintenance and cure. *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 40-41 (1943). If *Sieracki* retains any vitality, the constitutionality of the extension of coverage by the Amendments could be supported on this theory.

The petition to review in Dellaventura's case is dismissed as untimely and the petition in Scaffidi's case is dismissed on the ground that there no longer is a justiciable controversy between the employer and the employee. The petitions in Blundo's and Caputo's cases are denied on the merits.

LUMBARD, Circuit Judge (concurring and dissenting)

I agree that Pittston's petition seeking review of the award in Scaffidi's case should be dismissed as there is no justiciable controversy by reason of the insurance carrier's payment of the award. I also agree that Pittston's petition to review Dellaventura's case should be dismissed as untimely filed.

With respect to the denial of the petitions in the Blundo and Caputo cases, I respectfully dissent. As the relevant considerations have been so ably and extensively set forth here by Judge Friendly and also by Judge Winter in I.T.O. of Baltimore v. Benefits Review Board, U.S. Dep't of Labor and Adkins, 529 F.2d 1080 (4th Cir. 1975), no purpose would be served in any further protracted discussion. I agree with Judge Winter that "[t]he 1972 extension of coverage was intended only to remove inequities and anomalies arising when a person otherwise engaged in 'maritime employment' was injured on land," 529 F.2d at 1081, and with his additional statement that ". . . with respect to longshoremen or other persons engaged in longshoring operations, the Amendments extend only to those employees engaged in loading and unloading activities between the ship and the first (last) point of rest, including checkers 'directly involved in [such] loading or unloading functions,' " 529 F.2d at 1088.

It is more in keeping with the realities of maritime employment to draw the line at the first point of rest in discharging the cargo and at the last point of rest in loading a vessel. Moreover, such a rule is far easier to apply and avoids claims such as that put forward by Dellaventura that he is entitled to compensation for his injury while loading a consignee's truck with coffee bags which had been stored in a warehouse for 133 days after being removed from the ship CAMPECHE. This being so, it seems to me that the interpretation adopted by the Fourth Circuit is more consistent with what the Congress intended and with the language of the 1972 amendment.

Blundo, a checker employed by I.T.O., was injured while checking cargo being removed from a container. The container was located on a stringpiece of the 19th Street pier in Brooklyn, had been unloaded a few days before at a different pier and had been trucked through the streets to the 19th Street pier to be opened there by United States Customs before the container was stripped. What Blundo did was done well after the container had been left at the first point of rest.

Caputo's principal duties related to terminal labor. When injured he was working at the northeast marine terminal on the Brooklyn waterfront inside the truck of a consignee, while helping the consignee's truck driver load boxes of cheese which had been discharged from a vessel at least five days before. Thus in Caputo's case his activity occurred after the boxes of cheese had come to rest on the pier.

For these reasons I would grant the petition and set aside the awards in the cases of Blundo and Caputo.

APPENDIX I

S. Rep. 92-1125, pp. 12-13; H. Rep. 92-1441, pp. 10-11;
1972 U. S. Code Cong. and Administrative News
pp. 4707-4708

Extension of Coverage to Shoreside Areas

The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages. The following are the maximum limits on the compensation payable for permanent total disability in some maritime States:

California	$70.00
Florida	56.00
Hawaii	112.50
Louisiana	49.00
Maryland	85.68
Massachusetts	[1]77.00
New Jersey	101.00
New York	80.00
Oregon	62.50
Pennsylvania	60.00
Texas	49.00

[1] Plus $6 for each dependent.

Also, under the laws of some states due to exemptions based upon the number of employees hired some workers might be uncovered in the event they are unfortunate victim of an injury.

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of long-

shoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier. wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person

who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.